No. 15,602

United States Court of Appeals

For the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

ARTHUR D. KLANG,
333 Kearny Street,
San Francisco 8, California,
Attorney for Appellants.

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QUESTIONS INVOLVED.

May two defendants be convicted of conspiracy to illegally conceal and transport and to sell, dispense and distribute narcotics (heroin, here) when there is some evidence against one defendant but no evidence or proof of either knowledge or participation by the other?*

May one of two defendants be convicted of the illegal sale of narcotics (heroin, here) when there is some evidence against the one defendant who was convicted but no evidence or proof of knowledge or participation of any kind by the other defendant?†

May the discovery of hidden narcotics (marihuana, here) during the search of a residence flat where defendant was only a visitor and where there was no evidence whatever that he resided therein or that he had any control or domination over the premises or the narcotics be made the sole basis of conviction of such defendant for possession of narcotics?‡

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*Both appellants were so convicted here.

†Appellant William Evans was so convicted here.

‡Appellant William Evans was so convicted here.

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APPELLANTS' OPENING BRIEF.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION OF THE DISTRICT COURT AND OF THIS COURT HEREIN.

An indictment was presented by the Grand Jury of the Northern District of California against these appellants. The indictment contained four counts. It was returned upon March 13, 1957. The counts were:

> Count 1 charged concealment and transportation by both defendants upon March 4, 1957, at San Francisco, California of two ounces of heroin, imported into the United States contrary to law, in violation of 21 U.S.C., Sec. 174. (TR 3.)
>
> Count 2 charged that both defendants did, on March 4, 1957, sell, dispense and distribute, not in or from the original stamped package, 2 ounces

of heroin, in violation of 26 U.S.C., Secs. 4704 and 7237. (TR 4.)

Count 3 charged that both defendants on March 4, 1957 did conceal and facilitate the concealment and transportation of 22 grains of marihuana, acquired, obtained and possessed without first having paid the transfer tax imposed by Title 26 U.S.C., Sec. 4741(a), in violation of 26 U.S.C., Secs. 4744 and 7237. (TR 4.)

Count 4 charged that both defendants, at a time and place unknown, did wrongfully and wilfully conspire together with the objects to sell, dispense and distribute, not in or from the original stamped packages, quantities of narcotic drugs (heroin) in violation of 26 U.S.C., Secs. 4744 and 7237, and to conceal and facilitate the concealment of narcotic drugs (heroin) which had been imported into the United States contrary to law, in violation of 21 U.S.C., Sec. 174.

Under this conspiracy count were alleged 4 overt acts, viz,

1. That on March 1, 1957, Josephine Evans received $700.00 from Sine Gilmore at 1567 Ellis Street, San Francisco, California.

2. That on March 1, 1957, William Evans had a conversation with Sine Gilmore in the vicinity of 1540 Ellis Street, San Francisco, California.

3. That on March 2, 1957, William Evans had a conversation with Sine Gilmore in a 1949 2-door

Buick sedan on Ellis Street between Fillmore and Broderick Streets, San Francisco, California.

4. That on March 4, 1957, Josephine Evans had a conversation with Sine Gilmore on Pierce Street, between Oak and Page Streets, San Francisco, California. (TR 4.)

To each of these counts both defendants pleaded not guilty; a jury was waived; and the cause came on for trial on May 2, 1957. (TR 26.) The defendant and appellant William Evans was found guilty upon each of the 4 counts. (TR 6.) The defendant and appellant Josephine Evans was found guilty upon counts 1, 2, and 4, count 3 was dismissed as to her. (TR 23.)

Motions for acquittal of both defendants were made during the trial at the conclusion of the Government's case. (TR 172.) They were denied (TR 175) except as to Count 3 with respect to appellant Josephine Evans.

Motions for acquittal and for new trial were made after trial on behalf of each of the defendants below (TR 9), points and authorities in support thereof being found in TR 11-20. These motions were denied upon June 13, 1957. (TR 21.)

Defendant William Evans was sentenced upon June 20, 1957, as follows (TR 6):

Count 1: Imprisonment for 40 years; fine $5,000.00.

Count 2: Imprisonment for 40 years.

Imprisonment imposed on counts 1 and 2 to run concurrently.

Count 3: Imprisonment for 10 years; fine $1,000.00.

Imprisonment upon count 3 to run concurrently with imprisonment upon count 1.

Count 4: Imprisonment for 10 years; fine $5,000.00.

Imprisonment upon count 4 to run consecutive to that imposed on count 1.

Total imprisonment: 50 years; total fine $11,000.00.

Recommendation "That no early parole be considered."

On July 9, 1957, defendant Josephine Evans was sentenced as follows (TR 23):

Count 1: Imprisonment for 5 years.

Count 2: Imprisonment for 5 years.

Count 3: Dismissed as to this defendant.

Count 4: Imprisonment for 5 years.

Imprisonment on counts 1, 2, and 4 to "Commence and to run concurrently with each other."

Notice of appeal from the above judgment was taken by both defendants and was filed in the District Court upon June 21, 1957. (TR 21.)

JURISDICTIONAL STATEMENT.

(A) The statutory provisions believed to sustain the jurisdiction.

(1) The jurisdiction of the District Court.

Amendment VI to the Constitution of the United States which provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

Section 3231, of Title 18 of the United States Code, which provides:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

(2) The jurisdiction of this Court upon appeal to review the judgment in question.

Section 1294 of Title 28, United States Code, which provides:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
>
> (1) From a district court of the United States to a court of appeals for the circuit embracing the district."

Section 1291 of Title 28, United States Code, which provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district Courts of the United States, the District Court for the Territory of Alaska, the United States

District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

(B) The pleadings necessary to show the existence of the jurisdictions.

The indictment (TR 3).

Pleas of not guilty to each count entered by each defendant.

(C) The facts disclosing the basis upon which it is contended that the District Court has jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question.

Reference is respectfully made to the commencement of this brief, where the facts with respect to indictment, plea, judgment and orders, are set forth.

STATEMENT OF THE CASE.

As more particularly set forth in detail under "A statement of the pleadings and facts disclosing jurisdiction of the District Court and of this Court herein", hereinabove, an indictment was returned upon March 13, 1957, with respect to both appellants here. The indictment contained four counts and both appellants were charged in each of the four counts. Count 1 charged concealment and transportation of heroin, count 2 charged sale of heroin not from original stamped package, count 3 charged concealment and transportation of marihuana, and count 4 charged conspiracy between the two defendants, appellants herein,

to "sell, dispense and distribute . . . heroin" not from original stamped packages, and "to conceal and facilitate the concealment of . . . heroin".

Under count 4 the indictment alleged four overt acts, viz,

1. Payment of $700.00 upon March 1, 1957 by Sine Gilmore to appellant Josephine Evans. (TR 5.)
2. That on March 1, 1957 appellant William Evans had a conversation with Sine Gilmore on Ellis Street. (TR 5.)
3. That on March 2, 1957, appellant William Evans had a conversation with Sine Gilmore in a Buick sedan. (TR 5.)
4. That on March 4, 1957, appellant Josephine Evans had a conversation with Sine Gilmore on Pierce Street. (TR 6.)

All of the above charges and acts in San Francisco, California.

Appellants will contend that these four overt acts were innocuous and served in no wise to further any conspiracy.

Both defendants pleaded not guilty to each of these counts; a jury was waived; and the cause was tried on May 2, 1957 before the Honorable George B. Harris. (TR 26.) At the conclusion of the trial appellant William Evans was found guilty upon each of the four counts. (TR 6.) Appellant Josephine Evans was found guilty upon counts 1, 2, and 4, with Count 3 (the marihuana count) dismissed as to her. (TR 23.)

Motions for acquittal of both defendants were made during the trial, at the conclusion of the Government's case. (TR 172.) They were denied (TR 175) except as to count 3 with respect to Josephine. Appellants place great stress upon their contention that no telephone conversation by defendant William Evans had been proven and that it was prejudicial and reversible error to deny their motion for acquittal made (TR 175) at the close of the Government's case.

Motions for acquittal and for new trial were also made after the close of the trial on behalf of each of the defendants below. (TR 9.) Points and Authorities in support thereof are contained in the Transcript, at pages 11-20. These motions were denied June 13, 1957. (TR 21.)

Appellant William Evans was sentenced upon June 20, 1957 (TR 6) to imprisonment for 40 years with a fine of $5,000.00 upon count 1, with imprisonment for 40 years upon count 2, such imprisonment to run concurrently; imprisonment for 10 years and fine of $1,000.00 upon count 3, imprisonment upon count 3 to run concurrently with imprisonment upon count 1; imprisonment for 10 years and fine of $5,000.00 upon count 4, imprisonment upon count 4 to run consecutively to that imposed on count 1.

Total imprisonment: 50 years; total fine $11,000.00. Recommendation "that no early parole be considered."[1]

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[1]San Francisco Chronicle, June 21, 1957: "It was the stiffest narcotics sentence ever imposed here."

Defendant Josephine Evans was sentenced upon July 9, 1957, as follows (TR 23):

Imprisonment for 5 years upon count 1, imprisonment for 5 years upon count 2, imprisonment for 5 years upon count 4, with imprisonment on counts 1, 2 and 4 to "commence and run concurrently with each other." (Count 3 having been dismissed as to this defendant.)

Thereafter this appeal was taken by both defendants below.

Insofar as both defendants and appellants are concerned the activities testified to commenced upon February 27, 1957, and terminated upon March 4, 1957; the additional transaction involving count 3 and the appellant William Evans only, was upon March 5, 1957.

Appellants here summarize briefly, but very accurately, what is set forth in precise detail in the appendix to this brief, arranged witness by witness in the order called. Appellants will place great stress upon the insufficiency of the proven facts here recited to establish any crime or any of the elements of a conspiracy.

THE EPISODES OF FEBRUARY 27, 1957.

On this date, about 1:30 A.M., a telephone call was made by Sine Gilmore (the Government informer and decoy in this case) from the offices of the Federal Narcotics Bureau in San Francisco, to Walnut 1-0451,

with the subscriber as Oliver's Restaurant, and billed to appellant Josephine Evans. (TR 32.) This call was monitored by federal narcotic agents. The recipient was not notified that the call was being monitored. Gilmore asked for "Bill", the person answering said "This is Bill", the informer said he had a man in from Stockton who "wants another just like it"[2] and wanted to come and see "Bill." The answering voice replied "No, I am busy now. You will have to see the boss tomorrow." (TR 32-36.) The voice was not identified during the prosecution case, except that the informer said "Well, I think it was Evans". (TR 95.) After denial of a motion for acquittal and on his own case in chief, appellant William Evans testified to receiving the call. (TR 180.)

About 1:00 P.M. of that same day the federal agents searched the informer, searched his vehicle, supplied him with $350.00, and followed him to Oliver's Restaurant, where he entered about 1:00 P.M., and stayed for almost an hour with federal "stakeouts" near by. (TR 38.) Agent Wilson M. Shee entered that restaurant before Gilmore did and remained until after the decoy left. He saw appellant William Evans and Gilmore having a five to ten minute conversation at the end of the counter as Evans was having coffee. (TR 59-60.) There is no claim by the Government that this conversation was of any significance. (TR 59-60.) The $350.00 was returned by the informer to the agent. (TR 53.) No exchange of money or delivery of nar-

[2]The record contains no reference to any man from Stockton or to explanation of the term "another just like it".

cotics was testified to or was claimed by the Government to have occurred upon February 27, 1957.

This recital covers the February 27 episodes, including both telephone call and the visit to Oliver's Restaurant by the decoy. Agents Nickoloff and Shee, and Gilmore, the informer, were the only prosecution witnesses. Their testimony is set forth in accurate detail under the "witness by witness" summary contained in the appendix to this brief, as is that of *all* witnesses who testified at the trial on any aspect.

THE THREE EPISODES OF MARCH 1, 1957.

Testimony was offered by the prosecution as to three events occurring upon this date (with the last one running over to the early morning of March 2nd). The first was about 3:00 P.M., at which time agent Nickoloff searched the informer (Gilmore)—found upon him $350.00 of his own money and furnished him with $350.00 additional of government advanced funds. (TR 39.) The agent also placed upon his person a Schmidt transmitting device. This was a small radio transmitter which transmits sounds which are picked up by a receiving device normally located somewhere within a short vicinity of the transmitter. (TR 39.) He also searched the decoy's vehicle which the latter drove from the government office to the vicinity of Oliver's Restaurant, where he parked the vehicle and went into the restaurant at about 3:30 P.M. This same agent followed the informer's vehicle and parked nearby. The informer remained in the restaurant

premises a little over an hour—entered his vehicle—drove to the government office—where the agent followed him, and searched both vehicle and person. He did not find the $700.00. (TR 40.) The informer was in view of the agent at all times except while he was in the restaurant. While informer was in the restaurant agent Steffensen was in a panel truck of the Federal Bureau of Narcotics (TR 62) which held the receiving device for the Schmidt transmitter and which was parked directly across from the restaurant. Agent Steffensen observed the informer in the restaurant, saw him sit at the counter, eat a meal, and saw him at approximately 4:20 leave the counter and go to the rear of the restaurant which was the kitchen. Informer went into the kitchen alone—he was out of sight of the agent for "approximately three or four minutes" and then re-entered the restaurant with the appellant Josephine Evans. The informer had a short conversation with her and left. (TR 63.) He testified that on this occasion he paid the defendant Josephine $700.00 for pre-existing indebtedness for narcotics purchased "on consignment". (TR 87.)

The second event occurred about 7:00 P.M. at the Federal Bureau offices where agent and decoy had remained until that time. The agent again searched the informer's person, again placed a Schmidt transmitter on his person, again searched his vehicle, and again followed him to the vicinity of the restaurant, where the informer parked almost across the street from the restaurant. (TR 40-41.) The receiving device for the transmitter was located in a government ve-

hicle parked nearby and containing other narcotic agents. The informer did not enter the restaurant on this occasion. He remained seated in his car until 7:45 when the appellant William Evans approached and entered the vehicle. The car containing only the informer and Evans drove via Ellis and Fillmore Streets to the Chicago Pool Hall near Fillmore and McAllister Streets where Evans left. During the trip the vehicle was followed by agent Nickoloff, and after Evans left, the agent followed it away—met with the informer—and returned with him to the government office.

During the foregoing events the agent Steffensen was still in the panel truck and when he saw the defendant William Evans leaving the restaurant and entering the vehicle of the informer he testified that he heard this defendant say "I am leery of the panel truck. It has been parked there all afternoon." (TR 63-64.) The witness Steffensen testified upon cross-examination that the rest-room of the restaurant was in the back near the kitchen and that he did not know whether the informer went to the kitchen or to the rest-room—all he could say was that he saw both the informer and appellant Josephine Evans come out—and that Josephine was dressed to indicate she was working there. (TR 64-65.) The informer, Gilmore, testified to conversing with defendant William upon the sidewalk—with a request that he take Evans to the pool hall and that he did so. (TR 91.)

The third episode occurred the same day just prior to midnight. Agent Nickoloff again searched the informer—found no narcotics or money on him—checked

the Schmidt transmitter on his person and followed him to the vicinity of the restaurant where he again parked. The informer left the vehicle—walked into the restaurant—was there "just a moment" when he came out and returned to his vehicle followed by the appellant William Evans. (TR 43.) The informer and Evans drove west on Ellis Street to Broderick where they turned south—at which place the agent cut off his observation. On this occasion the agent Nickoloff had the Schmidt receiver in his Narcotic Bureau car and while following the informer's vehicle west on Ellis Street he testified as follows (quotations are complete and exact—there was nothing else in the transcript):

> Evans said "You don't see what's going on around you very well." "There has been heat all around the place tonight. There was heat in the restaurant and in the Booker T. Washington, and we are going to have to let things cool for a few days, and you will have to get in touch with me later."
>
> The informer said "Well, I don't have any money or anything else. What am I to do?"
>
> Evans replied "Don't worry about it. I will take care of you." (TR 45.)

The informer testified that he drove the appellant Evans home from Oliver's Cafe. That he had a conversation about playing pool and that Evans told him "He would help me out". (TR 92.) This completes the summary of the three episodes occurring upon March 1, 1957. At no time during these episodes, or at any other stage of the trial of this case, were

the two defendants shown to have been together or to have been in the restaurant at the same time.

THE "VACANT LOT" EPISODE OF MARCH 4, 1957.

Agent Nickoloff met the informer at Webster and Haight Streets in San Francisco at 11:00 A.M. The informer was in his vehicle and the agent searched both person and vehicle and with agent Steffensen followed him as he drove his vehicle west on Haight to Pierce—turned north on Pierce—and parked on the east side of Pierce between Oak and Page Streets. (TR 45.) The agents parked on the opposite side of Pierce Street a block and a half away. At 11:15 A.M. they observed a green Chrysler car parked a half a block from where the informer was parked. The defendant Josephine Evans alighted from this vehicle and crossed the street and the two walked into a vacant lot out of view of the agent Nickoloff. (TR 46-47.) They were out of sight a few seconds (TR 47) —the woman walked back to her vehicle and returned to the vacant lot out of sight of the agent—and then returned again to her vehicle and drove away. The informer came out of the vacant lot and entered his vehicle and also drove away where the agent met him at a drive-in and received from him a newspaper wrapped package (TR 48) (Govt. Exhibits 1 and 3; TR 48, 172, 51, 175.)

The package contained a piece of tin foil inside the newspaper and also a white coin envelope. (TR 50.) The contents of the envelope were identified as two

ounces of heroin. (TR 29, Govt. Ex. 1.) Newspaper wrapping, tin foil wrapping, and the coin envelope became Govt. Ex. 3 as one exhibit. (TR 51; TR 175.) Agents Steffensen, Campbell, and Prziborowski were all nearby at the "vacant lot" episode—but of them only Campbell testified respecting it. He was using binoculars and testified that he saw appellant Josephine Evans make a motion with her hand pointing past the informer, that the latter made a few steps into the vacant lot, bent over, straightened up, placed his hand in his pocket and walked back to the sidewalk.

THE MARIHUANA TRANSACTION ON MARCH 5, 1957.

This is the final transaction or episode of the entire series. It is entirely independent from the other transactions and from the other counts—and was dismissed (being count 3) as to appellant Josephine Evans. It involves the finding by agent Prziborowski of a small quantity (22 grains) of marihuana. (TR 30; Govt. Ex. 2; TR 175.) The package was found inserted under the carpet in the top riser of the stairway at premises located at 953 Broderick Street. (TR 133.) These premises were occupied by Mildred Moore as a residence—she being the renter, with the gas and electric service issued in her name. (TR 195.) At this time she resided there with her two children—one of whom was the child of appellant William Evans. She testified that she knew William—had known him in Chicago (TR 196)—but that he had never lived at the 953

address with her—only visited once or twice a week —and maintained no clothing, toilet articles or other personal belongings at that address. (TR 196.) Appellant William Evans testified (TR 189) that he did not "maintain any clothes or toilet articles or other property at the place where Mildred Moore lives, 953 Broderick Street". There was no denial of these facts by the federal agents, although several were present at the time of the arrest, two of whom were sworn and closely examined as to the interior of the flat. Agent Yannello even testified (TR 216) to a "rather thorough" search of every room in the flat, including the bathroom. Every drawer was taken out, every suitcase emptied, every item of clothing "gone through quite thoroughly." (TR 216.) Yet no one identified *any* personal belonging of appellant William Evans.

Agent Prziborowski and the other agents entered these premises about 4:20 in the morning of March 5th. The entrance was made pursuant to a *warrant of arrest*[3] for appellant William Evans issued by the United States commissioner—by virtue of which he placed the appellant William under arrest. (TR 126.) There was no search warrant. (TR 130.) The premises consisted of an upstairs flat with a single entrance. The marihuana was found inserted in the top riser of the stairway behind the carpet. (TR 133.) The agent showed the package to appellant William Evans, and testified that Evans asked him "Is it mine?" "Where did you find it?" and also that he asked the agent if his answer would make any difference re-

[3]No search warrant was ever issued in this case.

specting a conviction and when told "It might" that appellant Evans said "Well, I will try to figure out what you have against me first before I answer that." (TR 135-136; also 154.) Evans denied these statements. (TR 201.)

The agent also testified that "William Evans, Mildred Evans, and two small children that were asleep in the back bedroom" were in the premises at the time of entry; that appellant William said they were his children and that Mildred said they were her children and gave her name as "Mildred Evans." (TR 142.) In reply to a question from the agent Mildred said that the marihuana "was not hers". (TR 143; 154.) Mildred denied giving her name as Mrs. Evans and testified that her name was Mildred Moore—that she so gave her name to the agents—that appellant William had at no time lived with her at 953 Broderick Street, but that he would visit her once or twice a week. (TR 196.) Agent Yannello testified briefly respecting this arrest and identified five agents as participating, including himself. (TR 152-160; 210-219.) However, only Przibórowski and Yannello were offered as witnesses.

Appellant William Evans testified that at the time of the arrest he resided at 1569 Ellis, above Oliver's Restaurant. That he knew Mildred Moore, that he was the father of one of her children, that he was not married to her, that he did not live at 953 Broderick Street, but that he spent an occasional night there with Mildred, never more than one at a time, with a total of three or four nights in the three months or

so that Mildred had lived at 953 Broderick. (TR 176-177.) That he did not maintain "any clothes or toilet articles or other property" at 953 Broderick Street. (TR 189.) He also testified that he did not know the marihuana was there—had not put it there—had never seen it before. (TR 183-184.)

The foregoing comprises a substantial narrative of the occurrence of the arrest at 953 Broderick upon the morning of March 5, 1957.

EVENTS AT THE FEDERAL NARCOTICS OFFICE ON THE MORNING OF MARCH 5, 1957.

In view of the fact that there was a conspiracy charge here involved and that there was considerable testimony respecting discussions in conversations had at the Federal Narcotics Office following the arrival there of appellant William Evans and of Mildred Moore (who, by the way, was never booked or prosecuted) and that such conversations affected the heroin counts as well as the marihuana count, appellants present this brief resume.

Only agents Prziborowski (TR 137-141; 144-152) and Yannello (TR 154-160), and appellant William Evans (TR 184-189; 194) testified to these conversations at the Federal offices.

The agents interrogated appellant William Evans by telling him that "We consider you pretty big in the dope business and you must have some pretty big connections." When appellant said "What do you call big connections . . . A. C. Marks?"

The foregoing is the testimony of agent Przibor-owski (TR 137-138) who said he then suggested that if appellant William Evans could "do anything to help the Government," he would bring it to the attention of the courts and the United States Attorney's office. And that appellant Evans replied "Well, what does that get me? Ten years instead of twenty?" (TR 138.) The agent testified further that appellant Evans told them about being subpoened for hearing before the Senator Daniels Subcommittee, and there was further discussion at this point respecting the Daniels Committee and its interrogation of appellant William Evans. However, other than indicating that he had been previously investigated for narcotic violations (a fact already established by his admission of identity to the charge of two priors for similar offenses) it does not seem necessary to burden this brief with an extended discussion on the point. Much more detail will be found in the appendix under our "witness by witness" statement. Appellant Evans denied that he first mentioned the name of Marks to the agents or discussed him. (TR 185-186.)

Agent Yannello testified respecting this same conversation, in which he had been the principal interrogator. He testified that appellant William Evans had mentioned the name of Marks first and had said that neither Marks nor the men from whom he purchased were "so big" and added "There is nobody that is so big that I can't score from them" (explained as "obtain narcotics"). (TR 155-156.) Appellants will bring to this Court in their Appendix hereto the exact lan-

guage of the statements *which the agents testified were made by appellant William Evans,* as well as *the exact testimony given by him on both direct and cross-examination.* No extended reference will be made here to this interrogation.

It was admitted by the agents that no effort was made to have stenographic notes taken of this interrogation at the Federal Narcotics offices, nor to have a recording made, even to call in any other agents to listen to it; nor were any notes taken by any of these agents during the course of the interrogations. (TR 145-150; 160.)

STATEMENT OF POINTS UPON WHICH APPELLANTS RELY ON APPEAL.

Appellants filed with this Court a statement of nine points (TR 227). In the preparation of their opening brief appellants have become convinced that by combining these various items into only four stated positions and arguments they would be enabled to present their views succinctly and with clarity—and avoid duplication. Believing that such an arrangement would be helpful to the Court as well as to the parties, appellants crave the indulgence of this Court in submitting the following positions upon this appeal in lieu of the formal statement of points heretofore filed. (TR 227.) They are:

I. The Evidence was and is Insufficient to Support the Judgment of Guilty.

II. Errors in the Admissibility of Evidence.

III. The Court Erred in Denying Defendants' Motion for Acquittal at the Conclusion of the Government's Case.

IV. The Marihuana Transaction. (Count Three.)

SUMMARY OF THE ARGUMENT.

As to Counts 1, 2, and 4.

These three counts deal with 2 ounces of heroin. Count 1 alleges concealment and transportation, Count 2 alleges sale, Count 4 alleges conspiracy to conceal and sell.

As to counts 1 and 2 appellant Josephine makes no serious appeal. No evidence was offered except that of informer and agent.

As to count 4 both appellants urge an utter and complete failure of the evidence to establish a conspiracy: insufficiency of the evidence.

As to counts 1 and 2 appellant William Evans contends that there was no evidence whatsoever to connect him with either of the acts charged, and that as to the conspiracy count (the only way in which his conviction on counts 1 and 2 could be established) the evidence was insufficient to establish a conspiracy.

As to counts 1, 2, and 4 appellants urge prejudicial error in the admission of both oral evidence and exhibits in the absence of the establishment of the corpus delicti, and in particular as to appellant Wil-

liam Evans the absence of any evidence connecting him with any conspiracy.

As to all counts appellants urge error in the trial court's denial of their motion for acquittal offered at the conclusion of the Government's case, in that there was wholly insufficient proof (none!) of the identity of appellant William Evans as having received a telephone call placed by the informer and monitored by narcotic agents. A telephone call upon which virtually the entire case of the Government rested as to appellant William Evans.

As to Count 3.

This was the marihuana count and involved only appellant William Evans and no conspiracy. Appellant argues that there was an utter absence of any evidence establishing him to have been in custody, control or possession of either the premises or the marihuana found thereat: insufficiency of the evidence.

I. THE EVIDENCE WAS AND IS INSUFFICIENT TO SUPPORT THE JUDGMENT OF GUILTY.[4]

There is so little—if any—evidence to establish a conspiracy in this case that appellants are actually at a loss to how best to present their argument under the above heading. Counts 1 and 2 deal with the 2

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[4]The conviction on count 3 (marihuana) is not involved in either the alleged conspiracy or the use of the informer, and affects appellant William Evans only. For these reasons it will be separately treated in Point IV under the heading: "The Marihuana Transaction (Count Three)".

ounces of heroin (Govt. Ex. 1), while count 4 charges a conspiracy having to do with the transactions set forth in counts 1 and 2. As has been seen, there was evidence, if believed, that appellant Josephine Evans made delivery of 2 ounces of heroin to the informer, Gilmore, in the "vacant lot transaction". She was found guilty, so the evidence was believed by the court. However, *both* appellants were convicted and sentenced on all three of these counts. The only possible manner in which the conviction of the appellant William Evans upon these three counts could be sustained would be by legal proof of the existence of a conspiracy with the appellant Josephine Evans. Likewise, the conviction of Josephine Evans upon count 3—solely of conspiracy, can be sustained only by legal proof of a conspiracy with appellant William Evans. In other words, appellants state preliminarily that while the conviction of Josephine upon counts 1 and 2 may have to stand (under the record here) it is legally impossible to have her conviction upon count 4 or to have the conviction of William upon counts 1, 2, or 4 upheld upon the record before this Court. There is no evidence of a conspiracy *of any kind*—whether criminal or otherwise—between these two appellants.

Appellants, they trust, may be pardoned for stating that it is still the law in the federal courts—as it is in the state courts—that in order to sustain a conviction of crime there must be substantial evidence. There must be an exclusion of every other hypothesis except that of guilt; the presumption of innocence obtains;

not only does that presumption of innocence obtain but it starts at the commencement of the trial and remains operating in favor of the defendant throughout the trial; the presumption of innocence alone is sufficient for an acquittal; the guilt of the defendants must be shown beyond a reasonable doubt; such conviction *cannot be based upon mere suspicion;* the facts established must be consistent with guilt, and *inconsistent with "every reasonable supposition of his innocence";* the jury (here, judge) must acquit if the facts are as consistent with innocence as they are with guilt; the burden is always upon the prosecution to prove the defendants' criminal act and intent to commit crime, beyond reasonable doubt. These truisms need no citation of authority but they have, in fact, been collected in the cases of *United States v. Schneiderman* (1952, U.S.D.C., S.D. Cal.) 106 F. Supp. 906, *United States v. Foster* (U.S.D.C., S.D. N.Y.), 9 F.R.D. 367, affirmed 183 F. 2d 201, affirmed 95 L.ed. 437; *U. S. v. Frankfeld,* 103 F. Supp. 48, affirmed 198 F. 2d 679.

It would seem to appellants—comparing these ancient but sound statements of the rules of criminal trials with the judgment of guilt and the terrific sentences herein imposed—that the honorable trial judge did not have these basic tenets in mind during the trial of the case or during the argument upon the motions for acquittal and the renewed motions for acquittal and new trial at the close of the case.

Appellants can only reconcile the conviction in this case of appellant Josephine upon Count 4 and of ap-

pellant William upon *any* count with a finding by the trial court of "Guilt by Association". For, lo, these many years, serious minded thinkers in this country have been concerned about the conviction of defendants upon little or no evidence *when the charge against them is unpopular.* Man after man prominent in the public eye has given vocal and forceful criticism to the occasional actions of juries in returning verdicts of guilty in "unpopular" cases, and of boards and commissions in imposing penalties in like instances. Arising largely—but far from exclusively—out of Communist accusations against persons in or out of government—this has been termed one of the gravest wrongs of the Twentieth Century. The very extent of the outcry against it evidences its widespread character and its serious threat to the freedoms guaranteed to the citizens of the United States of America by its Constitution.

In the instant case we have no jury—we have no board—we have no commission. We have a United States District Judge, sitting without a jury, finding these defendants guilty upon charges as to which the evidence offered by the Government is of the weakest character and as to which the proofs required by law are actually *non-existent.* The extent of the penalties imposed—if they stood alone—establishes the shocking view which the trial court took of these appellants. But the penalties do not stand alone! There are no proofs! The judgments of guilty surely stemmed only from (1) the unpopular type of offense involved, and, (2) the prior convictions of appellant

William of narcotic offenses. The law says such showing is insufficient. There *must be proofs—and legal proofs*—of guilt.

The charge of conspiracy.

We are concerned here with a charge of conspiracy and appellants will here offer definitions of such a crime—one from a federal case and one from a California case; definitions which they most earnestly wish the trial judge had had in mind during the trial.

Such definition seems to appellants to be succinctly and remarkably well stated in the very recent (1957) case of *People v. Goldberg,* 152 A.C.A. 598, and we quote from p. 603:

> "A criminal conspiracy is an unlawful agreement of the persons to commit an offense denounced by statute. Its legal existence can be established only when proof thereof is accompanied by competent evidence of an overt act. It may be proved by either direct or indirect evidence. It is usually proved by a recital of the circumstances. After proof of a conspiracy, the actual declaration of a conspirator outside the presence of his confederates involving them, relating to the conspiracy may be received in evidence. (citing) Where such declaration or act forms a part of the transaction which is in dispute, such declaration, act or omission is proper evidence. (citing)"

And from the often cited case of *Tingle v. United States* (1930, 8th Cir.), 38 F. 2d 573, we quote (p. 575):

> "But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or

more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or an agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This statement requires no citation of authorities. It is equally true that 'extra judicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.' "

Shannabarger v. United States (1938, 8th Cir.), 99 F. 2d 957, also well states some of the matters that have been referred to above. Quoting (p. 961):

"It is a settled rule of law that 'In conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged.' The agreement must, therefore, be established before a conviction can be sustained. (Citing) The agreement, however, is a fact which, like most other disputed facts, may be proven by circumstantial evidence. Where the government relies upon circumstantial evidence to establish the conspiracy, the circumstances must be such as to warrant the jury in finding that the conspirators had some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement, and the doing of some overt act to effect its object. (Citing) Further, the circumstances relied upon must be not only consistent with the guilt of defendants, but must be inconsistent with their innocence. (Citing)"

Four overt acts were charged in the case at bar:

> "1. Payment of $700.00 upon March 1, 1957 by Sine Gilmore to appellant Josephine Evans. (TR 5.)
>
> 2. A conversation on March 1, 1957 between appellant William Evans and Sine Gilmore. (TR 5.)
>
> 3. A conversation on March 2, 1957, between appellant William Evans and Sine Gilmore in a Buick sedan. (TR 5.)
>
> 4. A conversation on March 4, 1957, between appellant Josephine Evans and Sine Gilmore on Pierce Street. (TR 6.)"

Appellants do not even contend that these four overt acts so alleged were not established during the trial of this case. They merely insist that no one of these acts—or all of them—*bore any relation whatever* to the alleged conspiracy upon which the conviction herein was had and were in nowise in furtherance thereof, i.e., the only testimony respecting the payment of $700.00 upon March 1st to Josephine is that of Gilmore, the informer. He testified positively that he paid her that money upon a pre-existing indebtedness. (TR 87-89, Apx 11.) The conversation on March 1, 1957 between William and Gilmore was monitored by the federal agents and carried no sinister import. (TR 33-38, Apx 3; TR 94-96, Apx 12-13.) The conversation on March 2, 1957, between William and Gilmore in the Buick sedan was equally innocuous. (TR 44-45, Apx 5.) The only testimony relative to the conversation which took place between Gilmore and Josephine on March 4, 1957 on Pierce Street is that

of the informer. There may have been, as has been heretofore conceded, some unlawful activities at that time and place. The appeal of Josephine from the particular conviction on that occasion is not being pressed. However, no matter *what* was said or *what* was done in the so-called "vacant lot transaction" *no slightest portion or effect of it was in anywise connected with appellant William Evans.*

In other words, and referring to the four overt acts alleged (and proven), the only possible "tie-up" with appellant William Evans would be the two conversations referred to between himself and Gilmore. They are, as we have just shown, so innocuous as to barely (if at all) even arouse any *suspicion*, and, of course, *no* conviction may be sustained upon *suspicion.* Further, the informer, Gilmore, (the witness upon whom the government relied) testified positively that he had never discussed narcotics with William and that he had never paid William for any narcotics. (TR 91-93, Apx 11-12.) In the very teeth of this testimony of the government's own witness how can it be said that any element of the offense occurring at the "vacant lot" was brought home to appellant William Evans, or made a part of the conspiracy alleged to have existed between appellants William and Josephine?

It seems odd to appellants to argue such matters before this august appellate court without the citation of statutes, texts, cases—but the simple fact here is that (1) overt acts must be alleged and proven, (2) that none of the overt acts here alleged even remotely

serve to establish a conspiracy, (3) the only crime committed was that at the "vacant lot", and (4) *this record is as silent with respect to the connection of William Evans with that transaction as any record could be.*

Appellants would add here that there is little or no evidence whatsoever of association between the appellants William and Josephine during the period of the alleged conspiracy. True, they had lived as man and wife in Chicago, and they had lived as man and wife at 181 Thrift Street in this city; true, William operated a restaurant known as Oliver's Restaurant, and Josephine was seen in that restaurant (*but upon one occasion only*). *Neither upon that occasion nor any other were William and Josephine ever during the period here involved seen together or placed together.* Also, at no time here involved were William and Josephine and the informer, Gilmore, ever seen together or placed together.

As a matter of fact, the record is silent as to who owned the Oliver's Restaurant. The record is silent as to whether or not Josephine was employed by Evans in any capacity. The record is silent as to who was meant by "the boss", except that Gilmore, the informer, testified (TR 96, Apx 13) "I guess he was talking about Josephine." Appellant William Evans testified that he never referred to Josephine as "the boss". (Tr. 192, Apx 34.) There is no other evidence on the subject.

It is worthy of careful note that only twice did any government witness see appellant Josephine—once

at the restaurant for a moment with the informer Gilmore, and once at the "vacant lot". *Co-appellant William Evans was not present upon either occasion.*

There is not a single word from any government witness to show that any "order" for narcotics was given to appellant William Evans, or that any payment of any sum for narcotics (or anything else for that matter) was made to him. Not only is this true of the record on appeal but the government's own witness, Gilmore, himself says, with respect to the 2 ounces of heroin in the "vacant lot" transaction, that "He didn't know anything about it." (Tr. 103, Apx 15.) Nowhere in the record is there any showing whatsoever that appellant William Evans was in possession of heroin.

Appellants respectfully direct attention to the fact that the only statement by the informer, Gilmore, that might even remotely imply that appellant William Evans was engaged in the narcotic business is found on page 79 of the transcript. In this colloquy:

> "Q. Did you ever receive narcotics from either William or Josephine Evans?
>
> A. I suppose so."

Motion to strike was denied, and this question and answer followed (TR 80):

> "Q. (By Mr. Riordan.) When did you first receive narcotics from either of them?
>
> A. I don't remember when I first.
>
> Q. Well, approximately when, taking in mind the closest date in connection with March 4, 1957?
>
> A. Maybe one or two weeks."

Should the claim be made by the government that this was damning testimony and "evidence" by the informer against either Josephine or William there can be but one answer. The reply by Gilmore is in the *disjunctive*—in other words, the answer, if entirely correct, and if it were in fact, "Yes" instead of the indifferent "I suppose so"—would still refer to *neither particular defendant.* That is, taking the perjury test, if Gilmore made the reply "Yes", then he would be telling the truth had he received narcotics from Josephine Evans *or* had he received narcotics from William Evans. But, at the same time, his testimony could not by any stretch of the imagination, or by an application of legal legerdemain, be an assertion that he *did* receive narcotics from Josephine Evans, or that he *did* receive narcotics from William Evans. Therefore, this testimony is valueless for the purpose of establishing the receipt of narcotics from either Josephine Evans or William Evans. As a matter of fact, having already testified to having paid Josephine $700.00 for narcotics which he had *previously* received "on consignment", and having testified that he had received 2 ounces of heroin from her in the "vacant lot" transaction—the obvious inference—if one is to be taken—would be that he referred to having received narcotics from Josephine and *not* from William. He having thus previously testified to the receipt on two occasions of narcotics from Josephine Evans but also that he had never upon any occasion received narcotics from William. This seems like a schoolboy treatment of a question

and answer, but none the less it is very important to the appellant William Evans, for the trial judge by his ruling upon the motion to strike, and by his finding the appellants guilty—indicated that he had attached a legal effect to this question and answer which it did not, in fact, have.

No authority is needed to establish the fact that the prosecution—whether it is in federal or state courts—is bound by the statement of its own witnesses. If the government, in the instant case, was unable to extract from Gilmore, the decoy, the stoolpigeon, the informer, testimony as to matters which the government desired, certainly it is not the duty of the trial court, a trial judge sitting without a jury, to *assume* that such desired matters had been, in fact, actually established.

The language of Mr. Justice Fred B. Wood in the case of *People v. Barnett* (1953), 118 Cal. App. 2d 336—a narcotic conviction which was reversed—very patly and aptly applies to the case at bar (p. 338):

> "This is a very tenuous chain of circumstances indeed to support an implied finding . . ."

The Ong Case.

One reason that appellants have cited so few authorities hereinabove is that the principles of law are clear and unmistakable and in the humble judgment of appellants the problem confronting this Honorable Court is to weigh the facts here proven by the government as of the time of the submission of their case

at the conclusion of the prosecution case against the well-settled law. At the risk of repetition appellants will again state that they have purposely refrained from more extensive legal references hereinabove.

The second reason is that in this very Ninth Circuit, and in this very year of 1957 this very Court, in *Ong Way Jong, et al v. United States of America* (March 30, 1957), 245 F. 2d 392 (In Advance Sheet No. 2, dated August 26, 1957) reversed a conspiracy conviction in a narcotics case which bears a striking similarity to the case here before the court, but which was, as appellants view it, *far, far stronger for the prosecution than is the instant case.* As we have heretofore stated, an especial and painstaking effort has been made to set forth in the appendix *every bit of effective testimony* given in this case, witness by witness; likewise, effort has been made to make the Statement of the Case, *ante,* full and broad and complete. This being so, and the facts in the *Ong* case being very thoroughly detailed in the Court's opinion therein, it appears that nothing is to be gained by restating them—or by making any further substantial statement of the evidence in the instant case. Rather, appellants will examine the rulings of this Court in the *Ong* case upon its extremely comparative and similar situations.

After outlining all the facts in the *Ong* case the Court says (p. 394):

> "However, all this does not prove Ong was dealing in narcotics. Of course, there is a strong suspicion that he was. But there is no proof."

Appellants respectfully direct the Court's attention to the fact that there is likewise "no proof" that appellant William Evans was dealing in narcotics. In fact, aside from prior convictions for similar offenses—aside from an illicit (immoral) relationship with appellant Josephine—there is not even a "strong suspicion" that he was dealing in narcotics. He had done so, admittedly, in other jurisdictions—but it is most respectfully submitted that there is neither proof nor "strong suspicion" that he was so engaged in the State of California, or particularly, that he was so engaged in the instant transaction, or the current period.

The *Ong* opinion continues with respect to the admissions of a co-conspirator. As we have stated, the *Ong* case carries far stronger proofs than the instant case, for in the case at bar there were no "admissions of a co-conspirator" by which appellant William Evans *could* be bound. The only thing at all testified to respecting Josephine has to do with the "vacant lot transaction" and there is not a hint in that entire transaction that such a man as William Evans even existed. The opinion says (p. 394):

> "No evidence has been adduced which definitely proves that Ong was here engaged in any criminal activity. No one has directly testified to such a connection or any circumstances from which such an accessoryship could be legally inferred. Guilt by association would be the only basis."[5]

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[5]In support of this statement the opinion in its footnote 2 says, and we quote therefrom:

> "To infer guilt from mere association does not meet the test set in *Marino v. United States*, 9 Cir., 91 F.2d 691, 694, 113

Again appellants respectfully submit that this language is exactly appropriate to the record in the case now before this Court.

Continuing, the opinion states (p. 394):

> "Ong was constantly with Wee. Wee sold narcotics. Therefore, Ong must have supplied the heroin. This is a classic non sequitur. . . . If proof aliunde had established a conspiracy, Ong might be bound by the conversation of Wee. If then any connection between Ong and the substantive offense had been established, Ong would also have been bound by the declarations of Wee. But no such proof was present."

Again, we have the striking similarity to the case at bar.

But we proceed further (p. 395):

> "As is apparent, there is not a scintilla of evidence that Ong was guilty of conspiring to sell narcotics. He is not shown to have touched, possessed, sold or conspired to sell narcotics. The overt acts alleged in the indictment are entirely innocuous. Ong is not shown to have received, used, passed or touched any money used in the transaction of February 1, . . . Furthermore, Ong was not seen at or around the place of delivery of the narcotics. He was never found with any indicia of possible trading in narcotics or any evidence of conspiracy in his possession. The motion for acquittal must have been granted. In fact, it was denied.

A.L.R. 975 (cert. den.), to wit: Conspiracy 'is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.' "

> The excellent trial judge made the mistake of considering a mass of evidence which was only admissible against Wee. It is an unquestioned rule of law that there must be substantial evidence of a conspiracy before the acts and declarations of a supposed conspirator become admissible against any other defendant, if these are not done or said in his presence. (Citing authorities in note 5) This is because such acts are transactions between third parties, with which the other defendant has not shown by other evidence to have a connection. (Citing authorities in note 6) These matters are hearsay as to him."[6]

Appellants wish to quote the following paragraph from the Ong opinion—not because it fits the instant case—for the alleged co-conspirator Josephine gave no description of anyone—but to indicate to this Court how very much stronger was the evidence, or, shall we say, the grounds for suspicion, of the guilt of Ong than there is in the present case for the guilt of appellant Williams Evans. We quote (p. 396):

> "The danger of another rule is highlighted in this case. Wee never named Ong as a source of narcotics. But his description could fit no other person. Wee said the connection had no telephone, was an ex-bookie, was purchasing a

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[6]Again, appellants most respectfully point out that the *only transactions* involved in counts 1, 2 and 4 were on one hand the payment of certain money by the informer Gilmore to appellant Josephine, and upon the other hand delivery by Josephine of 2 oz. of heroin at the "vacant lot" to the informer, Gilmore; that these *each* were transactions "between third parties and with which the appellant William Evans has not been "shown by other evidence to have a connection. These matters are hearsay as to him."

> new Cadillac, and used to work in a cannery. This was all found to be true about Ong. But the declarations of Wee were not binding upon or admissible against Ong.
>
> The agents followed Wee during all of the negotiations relating to the sale of February 1. They saw Wee meet no one but Ong when Wee brought the narcotics back for sale. They saw Wee go to meet Ong immediately after he got the money for the sale. In each instance during the negotiations of the sale of February 1, when Wee said he was going to meet his 'connection', he met Ong. All this sounds quite convincing, and undoubtedly the agents themselves were convinced and convinced the learned trial judge that Ong was guilty."

The succeeding paragraph states further facts which would show strong grounds for "suspicion" but nowhere was there any *proof* that was admissible to establish a conspiracy or as against Ong, the alleged co-conspirator. The case of appellant William Evans could hardly fall more clearly into this same pattern.

Lest this Honorable Court might believe appellants to be so slothful as to be unwilling to do their own research or provide their own authorities they again state that in their humble judgment the Ong opinion provides a perfect parallel and one which they could hardly hope to excel by collating similar authorities—with necessarily different factual situations—from other circuits, none of which, incidentally, would be binding upon this court. With that further—and final—apology, appellants quote (p. 396):

> "In any event, there must be prima facie proof of a conspiracy before the acts and declarations of an alleged conspirator during the supposed execution thereof become binding upon a third party who is not shown otherwise to have conspired. The acts of Ong are not sufficient to show he had any connection with the delivery of the narcotics by Wee. Unless the acts and declarations of Wee outside the presence of Ong are admissible, the evidence would have been insufficient to warrant putting Ong on his defense. (Authorities cited in note 7)"

In what manner has any prima facie proof of a conspiracy between these two appellants in the instant case been established?

The opinion even refers to the fact that Ong kept silent in the face of incriminating statements and charges made in his presence—that being under arrest he was under no obligation to make response. Appellant William Evans was under arrest, too—but when interrogated at the Federal Narcotics Office on the morning of March 5, 1957, he answered all questions frankly and freely—making no effort whatever to conceal his past record—and making no statements which at the trial were proven to be untrue. At the trial there was no evasion—there was no concealment—there was not a single objection upon the part of counsel to any question propounded to William Evans upon cross-examination. Again, the tremendous "improvement" in the showing made by appellant William Evans as compared to that of appellant Ong.

The opinion in the *Ong* case goes further, and says (p. 397):

> "Ong testified in his own defense. It is said the trial court did not believe him. It is clear some of his testimony was contradictory. But he made no admissions of fact which tended to connect him with the conspiracy to sell narcotics. At the close of all the evidence, the prosecution was in no better position than when it rested at the close of its case in chief."

Appellants respectfully assert that the same thing happened in the instant case. Appellant William Evans also testified in his own defense—the trial court also did not believe him—but he made "no admissions of fact" which tended to connect him with any conspiracy to sell narcotics. Nor, was any of his testimony "contradictory" (as had been true with Ong).

Finally, appellants adopt as their closing paragraph under their sub-heading "The Ong Case" this language from page 396 of the opinion upon which they place so much reliance:

> "It is then argued that, since the trial judge had the responsibility of deciding on the facts, he must be deemed to have excluded incompetent evidence. But this rule is of no avail in the event a motion for acquittal is made at the close of the case for the prosecution. At such a point the incompetence and sufficiency of the evidence is raised as a matter of law. We hold no sufficient evidence was presented by the government to hold the defendant or to place him on his defense.

> Since the motion for acquittal was overruled erroneously, the cause must be reversed."

That the rule of the *Ong* case—which seemed so apparent to this Court—and which seemed so fair and just to these appellants, was given short shrift by the trial judge is abundantly disclosed by the colloquy between court and counsel at pages 171 and 175[7] of the transcript. Appellants will refrain from here quoting the entire sequences but content themselves with stating that the *Ong* case was *expressly disregarded* in the instant case.

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[7]From page 171 of the transcript:

"Mr. Klang. . . . Now, I don't know whether your Honor has had occasion—I assume your Honor is quite a busy man, but there is the case of Ong Wai Jong against the United States decided on March 30th——

The Court (interrupting). That is Judge Roche's case.

Mr. Klang. Well, it doesn't indicate here who was the judge.

The Court. I tried the companion case.

Mr. Klang. Well, your Honor should certainly be familiar with this.

The Court. I am familiar with it. I have read it several times.

Mr. Klang. I won't say that it is controlling, but I think it is certainly persuasive.

The Court. I sometimes think our Appellate Court judges should sit on the trial bench for awhile and we should go to the Appellate Court. Counsel, the objections are overruled . . ."

And from page 175 of the transcript:

"Mr. Klang. Your Honor, reading this case, your Honor——

The Court (interrupting). I have read it two or three times. I would disagree with that opinion. I know that case very well. I tried the companion case. I know the evidence. I can see how an Appellate Court might take the evidence in context and possibly how Judge Fee arrived at that conclusion. But sitting here in the trial court, hearing the witnesses, seeing their demeanor on the stand, taking the full impact of the evidence, in a compact sense, I would have to respectfully disagree with Judge Fee. That is my privilege, of course. It is his privilege to disagree with me. That is my view of the evidence. The motion for judgment of acquittal is denied."

The attempt at entrapment.

Although the Government did not succeed in entrapping appellant into the commission of any crime, there can be no question that the effort was made, and plans laid accordingly. In the execution of those plans, the "special employe," (TR 35) Gilmore was required to make a telephone call out of the clear blue sky, to this appellant, the effect of which was supposed to be that he, appellant, would commit a crime for which he was thereafter to be prosecuted.

It is an unquestioned principle of the theory of entrapment, that it is a positive defense and repugnant to good morals for an officer or his agents to conceive and plan an offense, and to procure the person to be charged, to perpetrate that crime.

18 A.L.R. 146;
66 A.L.R. 478;
86 A.L.R. 263.

The following testimony indicates beyond doubt that the sale of narcotics was conceived in the minds of the Government agents. This evidence was given by Gilmore and appears at page 106 of the transcript:

> "Q. (By Mr. Klang.) Now, the agents, Mr. Nickoloff and whatever agents were there, I assume directed you to talk to William Evans about narcotics, didn't they?
>
> A. That was the idea of the phone call.
>
> Q. Yes. And didn't you tell them that you had never talked to William Evans about narcotics and that he probably wouldn't discuss it with you?

A. I don't know whether in those words or not, but we was talking along those lines. *I know I told them he didn't sell narcotics.* (Emphasis supplied.)

Q. You told them he didn't sell narcotics?

A. So far as I know, he never sold any."

This could not be considered as merely giving a person inclined to sell narcotics, an opportunity to do so.

As a part of that plan by the agents, the following was the conversation on this telephone call, designed to entrap appellant:

Agent Nickoloff testified (TR 35) about what he overheard between the informer and appellant:

"This is Gilmore. My man from Stockton is in town again, the same one I did that thing for last week, and he wants another one just like it. I have the money with me now. Can I come to see you."

The reply by the voice answering the telephone was:

"No, I am busy now. You will have to see the boss tomorrow."[8]

In this connection, attention is called to the testimony of Gilmore (TR 93, Apx 11-12), to the effect that he had never had any narcotic dealings with defendant, either for a man from Stockton or for anyone else.

There is no testimony in the record about any "Stockton" episode. There is testimony, however, that

[8]Direct examination of Gilmore as to this telephone conversation is at pages 94 to 96 of the transcript.

Gilmore mentioned a "man from Stockton" to this defendant five or six days before, and said that he (Gilmore) "wanted $2000.00 worth of heroin . . . for the man from Stockton". (TR 193, Apx 34-35.) This was merely designed by the officers to entrap appellant into an incriminating conversation.

That appellant did not react as the agents desired is unimportant. What is important is that this evidence was used by the prosecution and actually considered by the trial court to convict appellant.

It is unimportant that appellant was not successfully entrapped into committing a crime conceived by the agents. It is just as much entrapment to so procure appellant to make the statements he is alleged to have made in response to this telephone conversation. Of course, even though appellant, because of his innocence in fact, made no incriminating statements, yet the trial court arbitrarily interpreted them as being a link in the so-called chain of evidence that he engineered the sale by Josephine Evans to the "special employee".

Appellant respectfully submits this is a classic example of "entrapment" which the policy of the law abhors and condemns.

Agency.

Appellants might well wait to see if this topic is raised in appellee's brief before commenting upon it. However, since it may not be so raised, appellants wish to call to the attention of this Court that the trial judge *himself* injected the suggestion of

"agency" into the argument, thereby establishing that such theory was in his mind. It is but logical to conclude that it contributed to his ultimate adverse decision. (TR 170). Most respectfully we submit that no element of agency was even remotely established by the proofs in this case.

Agency by whom—or for what? Who was the agent? Who the principal? We might assume that the trial judge had in mind that William Evans was the principal—that he was a "narcotic kingpin"—and that Josephine was his agent (his "mule", shall we say?). Where is there a scintilla of evidence that an agency existed? Josephine Evans (the evidence shows) delivered some heroin to Gilmore, the decoy, the stoolpigeon, in a vacant lot. Gilmore says that that same morning (March 4th) he made arrangements with Josephine for its purchase, upon a consignment basis, and paid her "one hundred and some odd dollars" on account thereof. He also says that he *never* discussed narcotics with William, nor paid him anything for narcotics. (TR 93, 102-103, Apx. 11-15). Josephine did not testify.

What evidence of agency is established? Appellants will answer their own question. None! And yet the judge who found these appellants guilty *brought up the agency suggestion himself.*

While, as stated, appellants do not propose to argue the matter of possible criminal agency unless the Government sees fit to rely upon it, a statement contained in the topic of Agency, 2 Am. Jur., Sec. 383, p. 301, might be considered:

"A master or principal may, under certain circumstances, be held liable criminally for an act committed by the hand of his servant or agent acting either under his direct authority or with his knowledge and consent, or without such authority or under his knowledge, or even in disobedience of orders. *It is without doubt, however, the broad general rule that a principal or master is not responsible for the criminal acts or misdeeds of his agents or servants unless he in some way participates in, countenances, or approves of what they do, or, as it is sometimes put, unless he counsels, aids, or abets therein, or procures the commission of the act. He must have knowledge of, and give his assent to, that which constitutes the violation of the law; in other words, the agent or servant must be acting with the principal's or master's authority.*" (Emphasis supplied).

Where, in the record of this case, has it been shown that there was direction, or knowledge, or consent, or participating, or countenancing, or approval, or counselling, or aiding, or abetting, or procuring by or on behalf of the appellant William Evans of the commission of any violation of the law? What evidence of agency, however remote, has been established between appellant William Evans and appellant Josephine Evans?

Appellants will answer their own question. None! And yet the judge who found these appellants guilty and gave the one fifty years imprisonment and $11,000.00 fine, and the other three five year sentences (concurrent) *brought up the agency suggestion*

himself. Under these circumstances, with jury waived, could a judge *possibly* have given these appellants a fair trial? Is this not confirmation of appellants' previously voiced belief that this appellant William Evans was convicted—not for acts or offenses proved—but by reason of prior association with the narcotics traffic? Guilt by association?

Aiding and Abetting.

Here, too, appellants might await appellee's brief to see whether aiding and abetting is urged. However, the Government attorney (TR 169-170) laid great stress upon this theory of guilt—he even likened it to "the theory of agency"—and we may fairly assume that the trial judge was thereby impressed by it, also.

This idea sprang from the brain of the prosecutor as did Aphrodite from the sea. There was no word in the indictment of "aiding and abetting"—there was not a word about it during the taking of evidence. The case was not tried upon that theory. This was just a last minute "shot in the dark" by the prosecutor—but one with no slightest support in law or in the evidence. There is, as we have just stated under the subheading "Agency", no slightest proof that Josephine "aided" or "abetted" in the commission of the offense for which William was found guilty. Or vice versa.[9]

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[9]Here, apparently, prosecutor and judge contended for the purpose of "aiding and abetting" that *Josephine* was the principal and *William* the aider and abettor. Or what *did* they have in mind?

The only link between William and Josephine is that she worked in Oliver's Restaurant and had at one time (not presently) lived with him. (TR 177-178; Apx. 29). Appellants venture to suggest that were every restaurant proprietor who "lives with" one of his female employees put in jail the number of eating houses would be vastly reduced.

This was just an "idea" the prosecutor had—he didn't even carry through on it—but apparently the trial judge did—to the extent of fifty years. A long, long time.[10]

The Inferences Expressly Accepted and Relied Upon by the Trial Judge.

Appellants no more purpose to argue here the "law" on inferences than they did, just *ante,* the law of agency or of aiding and abetting. They do wish, however, to direct to the attention of this Court the degree to which the trial judge *by his own statement* seized upon what he termed "inferences", and thereby found these appellants guilty by association. Assuredly, not sufficient under the law.

At page 173 of the transcript, after counsel for defendants stated:

> "Your Honor, the only one who knows what the conversation is that took place between them[11] tells your Honor in as plain English as he knows how—whether he can be believed is beside the point. The fact remains that he is their witness.

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[10]Longer, no doubt, for a man of forty-one than for a younger man.

[11]The informer, Gilmore, and appellant William Evans.

> He says that at no time did he have any transaction with William Evans concerning the narcotics."

The trial Court rejoined:

> "He meant by that, *the plain inference* to be drawn from that is that the delivery was consummated by the woman defendant. *The plain inference* to be drawn from his testimony is that Williams Evans was too smart to have any direct conversation. *That was the plain inference I drew,* and that the activities of William Evans were screened by the woman defendant known as 'the boss'."[12] (Emphasis supplied.)

And again, referring to the conversations of Gilmore and appellant Evans as heard over the Schmidt transmitter (TR 174):

> "The Court. *The plain inference* from those conversations is, in my opinion, that there was an incipient deal on and that the heat was on and they couldn't consummate the transaction. *That is the only inference I can draw."* (Emphasis supplied).

And thereupon the Court said (TR 175):

> "That is my view of the evidence. The motion for judgment of acquittal is denied."

Appellants will not reargue the evidence at length at this point. They will merely direct the attention of this Court to its own rule, established in *Toliver v.*

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[12]Except for a casual statement by Gilmore, the informer, at page 96 of the transcript, the record is singularly devoid of any suggestion as to the indentity of "the boss".

United States (1955; 9th Cir.) 224 F. 2d 742, a narcotic case, wherein it was stated at page 745 that:

> "The acceptability of the inference drawn turns on whether it has been founded upon 'fact' regardless of whether such fact has been arrived at by direct or circumstantial evidence."

And to the language of the Supreme Court in *Maggio v. Zeitz* (1947) 333 U.S. 56, at page 66:

> ". . . rules of evidence as to inferences from facts are to aid reason, not to override it. And there does not appear to be any reason for allowing such presumption to override reason when reviewing a turnover order."

Appellants most respectfully contend that the evidence referred to by the trial Court was wholly insufficient to establish a fact upon which to base the inferences recited by him, and that judgments of guilty and sentences for the equivalent of life are not to be imposed upon the whim or predilection of any trial judge or any trial court as to what properly constitutes "an inference."

Appellants close this first point in their Opening Brief, by referring to the recent case of *Rodriques v. United States* (1956; 5th Cir.) 232 F. 2d 819. This was a narcotics case, where conviction was had upon evidence set forth in footnote at page 820. The conviction was reversed for insufficiency of the evidence; evidence which seems to appellants to be much stronger than in the instant case. The opinion of Hutcheson, P.J., is referred to primarily for the statement we here quote, expressing, as it does, the view of ap-

pellants, but in language far better than we could phrase (p. 821):

> "The authorities are clear that circumstantial evidence may, of course, be sufficient to convict. Nevertheless, because of the fact that it is circumstantial and that a grave wrong may be done to an innocent man by reasoning from circumstances not sufficiently cogent in themselves or as connected, *and particularly not sufficiently exclusive of every innocent hypothesis,* the courts have been very sedulous to prevent an innocent man being found guilty where the evidence does not conform to the acceptable standards. (Citing numerous cases)." (Emphasis added).

Concluding their Point I, these appellants (and their counsel) offer the sincere opinion that in the case here before this Court we have, upon the one hand, *the heaviest sentence ever imposed upon a narcotics defendant in the jurisdiction of the Ninth Circuit,* and, upon the other hand, what is *probably the lightest and flimsiest set of "proofs" upon which a narcotics defendant (or, we venture to say, any other defendant) has ever been convicted in the jurisdiction of the Ninth Circuit.*

II. ERRORS IN THE ADMISSIBILITY OF EVIDENCE.

(1) At page 46 of the transcript Federal agent Nickoloff began his testimony relative to the "vacant lot" transaction and to the arrival there of a woman who "alighted from this vehicle, the 1955 green Chrysler". And at this point counsel for appellant

William Evans interposed this objection, and the following colloquy occurred (TR 46):

> "Mr. Klang. Pardon me. I want to object at this point, your Honor, particularly on behalf of the defendant William Evans. He is not chargeable with anything in reference to a woman coming there, he not being present himself. Can't permit it on the theory of conspiracy because there has been no conspiracy established.
> The Court. What are you offering this for?
> Mr. Riordan. Well, your Honor, I can't connect it all up through one witness. Either we make a case or we don't make a case.
> The Court. With your assurance that it will be connected———
> Mr. Riordan. I believe so. I strongly believe so.
> The Court. All right."

Appellant William Evans most respectfully represents to this Court that the testimony relative to the "vacant lot" transaction was *never* connected up. It is not possible to here recite *all* the evidence reported in this case in order to establish the correctness of appellant's statement, but in their Statement of the Case and particularly in their Appendix to this brief, appellants have (as they have heretofore stated) meticulously detailed every bit of applicable evidence produced in this case—and nowhere has there been any slightest proof that appellant William Evans was there present or had any slightest part in such transaction. The evidence—and all of it—with respect to the "vacant lot" transaction should have been stricken as to this appellant. The error was, very obviously, highly prejudicial.

(2) At page 95 of the transcript is the direct interrogation of the informer, Gilmore, with respect to the monitored telephone conversation. The record shows the following:

"Q. Who did you ask for?

A. I think I asked for Bill.

Q. What did the person on the other end of the line say?

A. I think he said, 'This is Bill.'

Q. Do you know who that 'Bill' was?

A. I guess it was him.

Mr. Klang. I move to strike that as an opinion and conclusion of the witness, your Honor.

The Court. Overruled."

It is respectfully submitted that this ruling was prejudicial error. Neither here nor elsewhere was it established that the witness knew appellant William Evans' "telephone voice" or had ever before or since conversed with William over the telephone. Gilmore so testified.[13] No authority should be required to establish that this witness offered only "an opinion and conclusion" or that such statement of identity—allowed to stand—was of irreparable harm to these

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[13]Page 106 of the transcript (cross-examination witness Gilmore):

"Q. Mr. Klang. Now, before that date, before February 27th, had you ever before that time talked to William Evans on the telephone?

A. No.

Q. Never did? Then you were not familiar on February the 27th with William Evans' voice on the telephone, were you?

A. No.

Q. And you had never discussed narcotics with William Evans on the telephone prior to that?

A. I never talked to him on the phone prior to that.

appellants.[14] Without it there is not even a *shadow* of proof of conspiracy.

(3) At page 135 of the transcript the Government produced Govt. Ex. 2 for identification (the package of marihuana found in the Moore flat at 953 Broderick) and questioned Federal narcotic agent Przibor-owski respecting it. Counsel for appellant William Evans made this objection:

> "Mr. Klang. Pardon me, your Honor, I would like to offer the objection at this time that there is no independent proof of the corpus delicti. The only thing we have is the presence of narcotics, but we don't have the possession or the dominion or control which is part of the corpus. The Court. Overruled."

Further interrogation of the witness was permitted and the package was thereafter received in evidence as Govt. Ex. 2 (TR 175).[15] It is respectfully submitted that the just quoted ruling by the Court and the subsequent admission of this evidence was prejudicial error as to appellant William Evans, inasmuch as *no slightest* degree of possession or dominion or control by anyone of the marihuana, was ever established. Authorities in support of the legal position

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[14]Should authority be required it will be found hereinafter under Point III, where the same contention is made in support of appellants' position with respect to the denial of their motion for acquittal.

[15]At which point (TR 165) counsel offered this further objection: "And I also want to offer the objection that so far as the last one, the alleged marihuana, is concerned, that they were obtained by means of unlawful search and seizure; that there has been no connection shown with the defendant. He hasn't been shown to live there or have any knowledge of them."

will be found in Point IV of this brief, to which reference is respectfully made. See also *Shannabarger v. United States* (1938, 8th Cir.) 99 F. 2d 957, quoted *ante,* this brief.

(4) At page 172 of the transcript the Government rested, and just prior thereto, at pages 165 to 171, occurred argument relative to the offers of exhibits on behalf of the Government.[16] Appellants have just discussed the error in the admission of the marihuana (Subd. (3), *ante*), but wish under this subheading (4) to urge the error of the trial Court in admitting *any one* or *all* of these exhibits as against appellant William Evans. Various formal objections were made at those pages, and will not be here repeated. Similar formal grounds of error, with abundant legal support, have been herein elsewhere set forth under Points I and III, to which reference is respectfully made, in order to avoid unnecessary repetition and undue length of this brief.

However, appellant William Evans wishes here to direct the careful and earnest attention of this Court to his most sincere claim and protestation: that *none* of these exhibits were or are admissible as *against him,* for the reason that no evidence whatever was produced to establish any guilty knowledge or participation by this appellant in any of the transactions

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[16]Four exhibits were offered and received on behalf of the Government. None were offered by defendants. See Appendix A, hereto.

or happenings recounted during the trial of this case.[17]

III. THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE.

At the outset, appellants desire to here adopt all that has been said elsewhere, in this, their opening brief, as to reasons why the judgment should be reversed. Particularly Point I, *ante,* and Point IV, *post.* There seems little to be gained except length and repetition by duplicating those arguments, in whole or in part, under this heading. What appellants desire to argue under their Point III is simply this:

> Under the state of the evidence at the time that the Government rested its case (TR 172) there was insufficient evidence upon which to predicate a conviction, and appellants should not have been required to put in a defense.

Hence, they moved under Rule 29, Rules of Criminal Procedure.

Appellants in their defense, called only two witnesses, Mildred Moore and appellant William Evans. Appellants desire to here assert that *not a word* spoken by either of these witnesses, whether upon

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[17]The Government's own informer, stoolpigeon, decoy, Gilmore, testified that he had never discussed narcotics with William, purchased narcotics from him, or paid any money to him. (Apx. 11-12, 14 and detailed references elsewhere herein in other treatments.)

direct or cross-examination,[18] cast any shadow of guilt upon either defendant upon the offense charged, or operated to "cure" any defect in the Government's case.[19]

Appellant William Evans testified that it was he who was on the receiving end of the monitored telephone conversation (TR 180, Apx. 29-30), and that the conversation was substantially as related by agent Nickoloff (TR 35, Apx. 3) and the informer, Sine Gilmore. (TR 95-96, Apx. 12-13). The substance of that conversation was quite innocuous[20] (please see treatment under Point I, *ante*) but it did set up at least a link between appellant William Evans and the informer and decoy, Sine Gilmore, which did not exist in the Government's case. Thus, not only should the trial judge have granted the motion for acquittal for utter lack of proof, and therefore relieve the defendants from going forward, but the lack of proof by the

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[18]A careful checking of the transcript will show that counsel for appellants interposed *not one word of objection* to any question put to either Mildred Moore or William Evans by the Government attorney. This is scarcely standard procedure when an attorney has a guilty client. It establishes that in addition to allowing the Government attorney free and unchallenged scope that attorney, skilled in everyday trial of similar prosecutions, was not able—even under the liberal rules of cross-examination—to extract any evidence from either witness which was in impeachment of such witness or in derogation of the defense of innocence of both defendants of any conspiracy. An innocence most stoutly contended for in the trial court and most sincerely here presented.

[19]Even had the Government been able to produce damaging evidence in the cross-examination of appellants' witnesses, Rule 29 of the Rules of Criminal Procedure, as appellants understand it, would operate to protect the position they were in at the time the first motion was made.

[20]It was not even included in the list of overt acts set forth in the indictment (TR 5).

Government of the identify of the one who received the monitored telephone call was thereby enabled to be overcome—so that its entire, all-over case might be termed stronger. The error would be more apparent were a jury present—but the error, and its harmful consequences, are still present in a trial by the court.

Appellants use the term "harmful consequences" for the reason that the really farcical showing of conspiracy upon which they were convicted upon three counts of the indictment was strengthened (if one may use that term) by the proof of the telephone contact. In fact, as we here maintain, *without that telephone contact* even this flimsy case becomes flimsier.

As appeared at the time the motion for acquittal was presented (TR 172) there had been on February 27, 1957, a monitored telephone conversation between the informer and someone known as "Bill". (TR 32-38, Apx. 3; TR 95-96, Apx. 12-13). Only two witnesses attempted to identify the "Bill" on the other end as appellant William Evans. As to the testimony of Federal Narcotic agent Nickoloff the trial Court sustained an objection. (TR 36-37). As to the testimony of the informer (Sine Gilmore), he said only (Direct Examination; TR 95):

A. Well, *I think* it was Evans.
Q. It was Evans?
A. *I think* so.

* * *

Q. Who did you ask for?
A. *I think* I asked for Bill.
Q. What did the person on the other end of the line say?

A. *I think* he said, "This is Bill."
Q. Do you know who that "Bill" was?
A. *I guess* it was him.

(Appellants have taken the liberty of emphasizing the words "I think" and "I guess".)

"I think" and "I guess" are hardly terms of positive swearing. The rules of reasonable doubt and moral certainty still obtain in criminal prosecutions in this country, in both state and federal courts, and it should hardly require either argument or authority to establish that no defendant may be convicted of a crime (and here we have a fifty year penalty—*more* than a life sentence for forty one year old appellant William Evans) upon the testimony of a witness[21] as to his identity that "I think" and "I guess" he was the man.

The Supreme Court of the State of California has had a recent comment upon the usage of terms such as these. In *Owings v. Ind. Acc. Com.* (1948), 31 C.2d 689, the subject matter being a physician's "guess" as to the origin of a disease, the Court speaking through Gibson, C. J., says (p. 692):

> "A 'Guess, in current best usage, implies a random hitting upon (or attempt to hit upon), either at random or from insufficient, uncertain or ambiguous evidence.' (Webster's Dictionary of Synonyms [1942 ed.], p. 188.) An opinion which is based on guess, surmise or conjecture has little, if any, evidentiary value. (Citing.)"

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[21]Here we even have the testimony, *solely,* of an informer, a decoy, the most miserable, contemptible and non-believable of all witnesses to come before a court.

Appellants respectfully direct attention to the fact that the opinion as quoted carries a Dictionary of Synonyms definition—and one which is surely broad enough to apply to the situation here presented. Nor is "think" any more evidentiary.

It is most respectfully submitted, not only that the motion for acquittal should be granted at the conclusion of the government's case, but that such refusal was prejudicial error, for the reason that on final consideration of the completed case, whether it have been by the trial judge or by this Honorable Court, there lay upon appellants the additional weight, for such worth as it might have,[22] of the *fact* of the monitored telephone conversation and the *implication* (supplied by argument by the Government) of the contents of the conversation. If nothing else, it did provide a "contact" between the informer and appellant William Evans (not appellant Josephine Evans) and set up an appointment for the meeting on March 1, 1957, upon which the Government now sets such store.

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[22]e.g. Assume, for the sake of argument, that this Honorable Court, reviewing *all* the evidence, should conclude that the judgment should be affirmed. Surely, if all reference to the monitored telephone conversation were deleted (and it would necessarily be, as we have seen above) we may safely assume that *no* court would affirm a conspiracy conviction upon such a slender thread. In such event—and this is purely an illustration to demonstrate the prejudicial effect of the trial judge's ruling—there could be no doubt of such prejudicial character, with resultant reversal therefor.

IV. THE MARIHUANA TRANSACTION (COUNT THREE).

Appellant William Evans presents this point alone—Count 3 was dismissed as to his co-appellant, Josephine (TR 24). No element of conspiracy is involved. No element of informer is involved. The evidence is brief—is clear—and is not even conflicting to any material degree. Yet the trial judge found appellant guilty. Not only that, but although the judge stated during the trial (upon *stipulation* that the quantity of marihuana involved would only make "about five cigarettes", (TR 217) that he would consider "that the marihuana was not in commercial quantities." (TR 221, Apx. 27-28): The sentence on that count? Ten years imprisonment and $1000.00 fine! Yet *all* that was involved in Count 3 (whether appellant was guilty or not guilty) was 22 grains of marihuana (Govt. Ex. 4)[23]—and that 22 grains discovered under circumstances making it extremely remote that appellant could have been guilty—or even have had guilty knowledge. Appellant feels that he urgently needs the protection of this Honorable Court to preserve the rights guaranteed to him by the Constitution and the protection of the laws "in such case made and provided."

Appellant's position here is based primarily upon the utter insufficiency of the evidence to sustain the conviction and, in turn, the failure of the trial court to grant his motion for acquittal. To the extent that

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[23]A very thorough search of the entire flat and all of its contents, bureau drawers, clothing, etc., was made, but no contraband located (TR 216, Apx. 27).

matters set forth in Points I, II and III hereinabove are applicable appellant adopts them and respectfully refers to them. Appellant renews his statement (for the last time) that he has attempted to meet the difficulty of establishing a negative (lack of sufficient proofs) by preparing and submitting an Appendix hereto which is, he verily believes, a careful and exact exposition of *all* of the material evidence (material to either prosecution or defense, that is) in condensed, yet highly accurate, form, and to that Appendix he again most respectfully directs the attention of this Court, in lieu of lengthening this already long brief by the inclusion at this point of large segments of testimony.

In particular, appellant also refers to his Statement of the Case under the subheading: "The Marihuana Transaction on March 5, 1957", *(ante),* and to the testimony of agent Przibórowski (Apx. 18-23), agent Yannello (Apx. 23-28), appellant William Evans (Apx. 29-36) and Mildred Moore (Apx. 36-38). This *covers the complete story of the "marihuana transaction".*

Appellant asserts, first, that there is nothing, literally and exactly *nothing,* to show that he had dominion or control or possession of the *premises* or the marihuana, second, that without proof of possession his conviction cannot stand.

Count 3 is based upon (and so stated to be) Section 4744 Title 26 U. S. C. as amended in 1956 (70 Stat. 567). This section deals only with marihuana

and is entitled "Unlawful possession". The indictment itself charges "possession" (TR 4). And, of course, no burden of proof shifts to a defendant until the government has proven that defendant "shall have had in his possession any marihuana . . .".

It is the rule—both Federal and in California—that to warrant—and to sustain—a judgment of guilty of the offense here charged *there must be proof of possession by defendant of the contraband.* Appellant William Evans most respectfully submits that there is not only *insufficient* proof—but *no* proof—of possession or of ownership or of control by him of the 22 grains of marihuana referred to in the indictment.

Let us examine, first, the Federal rule. This will be found well stated in two recent cases. One is *United States v. Maghinang* (1953, U.S.D.C., Del.) 111 F. Supp. 760, where this very section (No. 2593 of *prior* Title 26) was under discussion. There, as here, a motion for acquittal was denied.[24] This was later held by the court to have been error, in this language (p. 762):

> "The Government, I conclude, failed to produce sufficient evidence to prove one of the essential elements of the crime charged—possession of the marihuana cigarettes. Accordingly, a judgment of acquittal should be entered in favor of defendant."

In that case defendant had borrowed a car. He drove it some distance—was stopped by police—a search

[24]The jury disagreed, and thereafter upon renewal of the motion for acquittal it was granted, as stated in the opinion.

warrant was obtained—and 41 marihuana cigarettes were found concealed in a spot under the dashboard. The opinion says (p. 761):

> "There was no direct testimony that the marihuana cigarettes were in defendant's possession. The Government relied entirely on circumstantial evidence, i. e., defendant and the marihuana cigarettes were in the same car."
>
> * * * * * * *
>
> In short, to constitute possession, a defendant must '*knowingly*[25] have the condemned objects in his possession.' The Government contends that they have the advantage of a presumption of guilt in the case at bar. This runs counter to our orthodox teaching that every defendant is presumed innocent until found guilty.
>
> * * * * * * *
>
> Any provision which destroys the presumption of innocence and creates instead a presumption of guilt should be applied with caution in each particular set of facts and circumstances. Of course, the marihuana cigarettes found in the motor car belonged to some one. That was one of the large questions at the time of trial. And as I view the case, it is still a large question. At least it seemed so to 50% of the jury. There is in this case one view, i.e., defendant's conduct is as consistent with innocence as with guilt. In this Circuit and this District, the law on circumstantial evidence was ably discussed by my colleague, Judge Rodney, in U. S. v. Gasomiser Corp., D.C., 7 F.R.D. 712, 718. He wrote:

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[25]Emphasis by the Court.

> 'This then being a criminal case based upon circumstantial evidence, in order for the motions of the defendants to be denied guilt must be the only reasonable hypothesis from such evidence. If there is any other reasonable hypothesis, although admittedly guilt may also be a reasonable hypothesis, then the defendants are entitled to judgments of acquittal. In this circuit, it is clear that "In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt." (Citing), or, as it has been otherwise stated by many courts in this circuit "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused." (Citing).' "

Appellants have quoted this opinion at such length because it seems to provide a better reasoned and presented argument than they could, themselves, prepare—and because it presents a concise and sound statement of the law in general—both in state and Federal courts. (Appellants do not fear the expression several times as to the rule "in this circuit (3rd)" —they believe it to be the rule in *all* circuits.)

A later case—this time with higher authority—is also closely in point. The case is *Guevara v. U. S.* (1957, 5th Cir.) 242 F.2d 745. Here marihuana cigarettes were found in an automobile—half-way between the driver's seat and the passenger's seat. Only the driver was arrested. The Court stated (p. 747):

> "For all that the present evidence shows, it is just as reasonable to believe that the cigarettes belonged to the passenger as to the appellant. A jury must not be left to speculate and surmise in a criminal case, merely hoping that they are drawing the proper inference."

In reversing the judgment of guilty, the court said (p. 746):

> " 'Possession' is not defined by statute. It must, of course, be a knowing possession. (Citing.) It has been said that in common speech and in legal terminology no term is more ambiguous than the word 'possession', and this is especially true when it occurs in criminal statutory provisions. (Citing.) It is so fraught with danger that the courts must scrutinize its use with all diligence, and the jury must be carefully instructed in order to prevent injustice (Citing)."

The Court then quotes, with approval, the same portion of the opinion in *Rodriques v. U. S.* (1956, 5 Cir.) 232 F.2d 819, 821, with which appellants closed the presentation of their Point I hereinabove.

Turning now to the rule in California, appellants refer first to *People v. Antista* (1954) 129 C.A.2d 47. This is a case in which a conviction for unlawful possession of marihuana under the California statute (Health and Safety Code, Sec. 11500) was reversed. In doing so the lengthy and carefully written opinion cites and analyzes case after case which has been decided by the appellate courts of this state. Appellants fear their brief has become too lengthy, and for

that reason will confine themselves to quoting from the *Antista* case, without referring to the cases therein reviewed, and without referring to later cases—other than to say that Shepard citations reveal no contra. The facts of the *Antista* case are not particularly close to those of the case at bar (as were the two federal cases referred to above). Appellants have chosen it for the excellent and unchallengeable statements of the law of California upon the subject under discussion upon the instant appeal.

(From page 50):

> "To justify a conviction in any case on a charge of possession, it is necessary to prove that the accused knew of the presence of the forbidden substance and that the same was under his control. In the present case it was necessary for the state to prove either that the marihuana belonged to defendant or had been left in his care by someone else. Guilty knowledge is not presumed. It has to be established by evidence.
> * * * * * * *

(p. 51):

> Exclusive control and dominion over a car found to contain a narcotic is, of course, a potent circumstance on the question of possession of its contents.
>
> Upon the other hand, when there has not been exclusive possession of a car, the presence of marihuana cigarettes while the owner is seated in it with a friend, has been held insufficient to prove possession by the owner of the substance in the

absence of a statement by him or any circumstances tending to prove his knowledge of its presence.

* * * * * * *

(p. 52):

The fact that the court was not satisfied beyond a reasonable doubt that defendant Rivers had possession of the marihuana was an insufficient reason for finding that Antista had possession of it. Even if the court believed that both defendant and Miss Rivers had not told all they knew about the marihuana, this would not have supplied the affirmative evidence of knowledge of its presence which the state was required to produce.

* * * * * * *

(p. 53):

Although someone was guilty of possession, the mere fact that defendant, while disclaiming knowledge of the presence of the substance, was unable to produce evidence that it belonged to someone else was not, under the circumstances, evidence that it belonged to him.

The case of the state was incomplete in that there was insufficient evidence of knowledge on the part of the defendant. The fact that defendant's denial of knowledge may not have been convincing to the court did not supply the missing element. Defendant did not have the burden of establishing lack of knowledge. The burden was on the state to prove facts from which knowledge could be fairly inferred. It may be that evidence that defendant had substantially ex-

> clusive access to the apartment would have been sufficient. The evidence of the state established that others, also, had access."

An excellent discussion of the distinction between "knowledge of the contraband character of the property" and "defendant's awareness of the presence of the object" will be found in *People v. Gory* (1946) 28 C.2d 450, where the Supreme Court of this State also takes occasion to say (p. 454):

> "It has been repeatedly held that the term 'possession' as used in the State Poison Act (now embraced in the Health and Safety Code) means an 'immediate and exclusive possession and one under the dominion and control of defendant.' (Citing). . . . knowledge of the *existence* of the object is essential to 'physical control thereof with intent to exercise such control' and such knowledge must necessarily precede the intent to exercise, or the exercise of, such control. (Citing). The materiality of such issue as a matter of defense has been recognized in numerous instances by our appellate courts. (Citing)."

This case contains a long and learned discussion, citing many cases, and reference is respectfully made to the opinion therein.

Appellant, at the outset of this Point IV, carefully directed the attention of this Court to the complete testimony as to the "marihuana transaction" as set forth in the Statement of the Case and in the Appendix. He will not here attempt to supply further evi-

dentiary details, but makes respectful reference thereto.

He merely stresses at this point that there is *not a thing* to show that he resided at 953 Broderick Street —or that he was then doing *(or ever had done)* any more than come there *very occasionally* to stay all night with Mildred Moore and to see one of her children, of which he was the father. Notwithstanding the careful search made of the entire flat by several of the agents present on that occasion (including all clothing, bureau drawers, hunt for secret locations, et cetera) *not one single personal item* was shown to have been found which was identified with this appellant. Not even a tooth brush or a pair of pajamas or a razor—not *anything.* He testified that he had no such personal belongings in the flat. Mildred Moore so testified. The several agents there present did not testify to the contrary. (Apx. 27, 34, 37.)

Is this the sort of proof that would establish him as the owner—or in custody—or control—or possession—of a tiny packet of marihuana located behind a section of stair carpet? Can a visitor such as he be charged with such "possession" just because he happened to be there at the time? Mildred Moore may have had a dozen "boy friends"—would any one of them who may have happened to call at that particular time be found guilty of possession and sentenced to ten years imprisonment and fined $1,000.00? We think not![26]

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[26]And the arrest of this appellant on that occasion bore no relation whatever to the marihuana so found—it was in an entirely

Appellant most respectfully submits that upon no conceivable theory can his conviction of the "marihuana transaction" set forth in Count 3 be sustained.

CONCLUSION.

In conclusion, appellants wish to quote briefly from their treatment under Point I hereinabove:

> "Concluding their Point I, these appellants (and their counsel) offer the sincere opinion that in the case here before this Court we have, upon the one hand, *the heaviest sentence ever imposed upon a narcotics defendant in the jurisdiction of the Ninth Circuit,* and, upon the other hand, what is *probably the lightest and flimsiest set of 'proofs' upon which a narcotics defendant (or, we venture to say, any other defendant) has ever been convicted in the jurisdiction of the Ninth Circuit.*"

and to respectfully assert:

1. That the conviction of appellant Josephine Evans upon Count 4 must be set aside, for the reason that there is a complete absence of evidence of conspiracy;

2. That the conviction of appellant William Evans upon Counts 1, 2 and 4 must be set aside for the reason that as to Counts 1 and 2 no connection whatever with him has been established, and that as to Count 4 there is a complete absence of evidence of conspiracy;

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different matter. Strictly speaking, the agents were wholly without right to search that flat—such search bore no relation to the casual arrest of William Evans. Even had the flat been his, the search would have been improper.

3. That the conviction of appellant William Evans upon Count 3 must be set aside for the reason that no dominion, no control, no possession of the marihuana has been shown to have rested in him.

Dated, San Francisco, California,
October 25, 1957.

ARTHUR D. KLANG,
Attorney for Appellants.

(Appendix Follows.)

Appendix.

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Appendix A

THE EXHIBITS.

Government Exhibit 1

This exhibit consisted of a white cellophane package containing a white, powdery substance identified as 2 ounces of heroin (TR 29) and as coming from the "vacant lot" transaction on the morning of March 4, 1957. (TR 49.)

Government Exhibit 2

This exhibit consisted of a brown paper bag which contained a substance identified as 22 grains of marihuana (TR 30) and as coming from the search of the Mildred Moore flat at 953 Broderick Street on the morning of March 5, 1957. (TR 134-135.)

Government Exhibit 3

This exhibit consisted of a torn piece of newspaper, a piece of tinfoil, and a white coin envelope. (TR 50.) It was identified as the container and wrappers in which the 2 ounces of heroin from the "vacant lot" transaction on the morning of March 5, 1957, had come. (TR 48-49.)

Government Exhibit 4

This exhibit was a typewritten demand, consisting of two order forms of the Secretary of the Treasurer, and constituting a demand served upon both defendants pursuant to the Internal Revenue Laws. (TR 163-164.)

Defendants' Exhibit

There were none.

Appendix B

SUMMARY OF ALL OF THE TESTIMONY IN THIS CASE—ARRANGED IN THE ORDER OF THE CALLING OF WITNESSES.(Apx. 1)

George D. Crane (TR 27-31)

Chemist employed by the Treasury Department. Qualifications admitted. Identified Govt. Ex. 1 as received from agent Nickoloff and containing approximately 2 ounces of heroin. This exhibit consisted of a white cellophane package containing a white, powdery substance. (TR 29.) Witness also received from agent Prziborowski Govt. Ex. 2—a brown paper bag which contained marihuana from the search of Mildred Moore's flat at 953 Broderick Street. Witness testified that Govt. Ex. 2 contained approximately 22 grains of marihuana.

Theodore S. Swanson (TR 31-32)

Special telephone agent who testified that Walnut 1-0451 was in February 1957 the telephone number of Oliver's Restaurant, 1567 Ellis Street, billed to Josephine Evans.

(Apx. 1) In preparing this summary of all the evidence appellants have been thorough, painstaking and meticulous. Aside from the convenience of the Court, appellants wish to use it to establish their first position herein, i.e., Insufficiency of the Evidence to Support the Judgment of Conviction. They have, therefore, included *all* evidence at all material to the issues in this case, with appropriate transcript references. If there be errors, inaccuracy or incompleteness, such are without intention or knowledge of appellants, and will be in spite of their efforts to present in this Appendix every bit of the material evidence both for and against them on the trial below.

Robert Nickoloff (TR 32-58)

Federal Narcotics Bureau agent. On February 27, 1957 at 1:00 A.M. had Sine Gilmore ("an informer" referred to as a "special employee") make a telephone call to Walnut 1-0451. Witness monitored the call. It was answered by a man who was not informed the call was being monitored. The male voice said "Hello," the informer asked for "Bill" and the man answering said "This is Bill speaking." The informer then said (TR 35):

> "This is Gilmore. My man from Stockton is in town again, the same one I did that thing for last week, and he wants another one just like it. I have the money with me now. Can I come to see you?"

The person replied: "No, I am busy now. You will have to see the boss tomorrow." The informer said: "All right" and the conversation terminated. Two pages were devoted to an effort to qualify witness who testified that the answering voice was that of the defendant William Evans, but the Court sustained an objection thereto. (TR 38.) Later that same day (1:00 P.M.) the witness searched Gilmore, the informer, furnished him with $350.00, searched his vehicle, followed him as he drove to the vicinity of 1567 Ellis Street (Oliver's Restaurant). The informer entered, stayed about an hour, while there were several "standard stake-outs" (Narcotics agents) in the vicinity.

On March 1, 1957 witness saw informer at the federal offices about 3:00 P.M. He searched his person, found $350.00 of his own money on him—furnished

him with $350.00 additional—placed upon his person a Schmidt transmitting device. He then searched the informer's vehicle—again followed him to the vicinity of 1567 Ellis Street. (TR 39.) The informer parked his vehicle and went into the restaurant at 3:30 P.M. He remained about an hour—came out at 4:35—entered his vehicle and drove to the federal offices. Witness followed and searched his vehicle and person and found the $700.00 missing. (TR 40.) Informer had been within sight of witness at all times except while in Oliver's Restaurant.

At 7:00 P.M. the same day witness again searched his person—again placed a Schmidt transmitter on his person—searched his vehicle—and followed him again in a government vehicle to the vicinity of 1567 Ellis Street. There the informer parked his car but did not go into the hotel. (TR 40-41.) The receiving device for the transmitter was in a government vehicle parked nearby and containing other Federal agents. (TR 42.) The informer remained in his vehicle 45 minutes when the appellant William Evans approached and entered. The car left and drove out Ellis to Fillmore—south on Fillmore and stopped at the Chicago Pool Hall where Evans left the vehicle. Witness followed the vehicle—followed it away after Evans left—and met with the informer and returned with him to the federal office. (TR 42-43.)

On the same date the witness searched the informer and found no narcotics or money on him—checked the Schmidt transmitter which was upon him—and again followed him to the vicinity of 1567 Ellis Street. This

time the informer walked into the restaurant—was there "just a moment" and came out followed by appellant William Evans. They both entered the vehicle and drove west on Ellis to Broderick, where they turned south. Witness observed them no further but met with the informer a few minutes later. (TR 43.) During this last trip witness had the Schmidt receiver in the Government vehicle he was operating and testified that he heard appellant ask the informer if he would ride him home; that the informer said "Yes", and that, while being driven, defendant said:

> "You don't see what's going on around you very well. There has been heat all around the place tonight. There was heat in the restaurant and in the Booker T. Washington, and we are going to have to let things cool for a few days, and you will have to get in touch with me later."

To this the informer said "Well, I don't have any money or anything else. What am I to do?" The reply was "Don't worry about it. I will take care of you." This was the entire conversation. (TR 44-45.)

On March 4, 1957 witness met Gilmore at Webster and Haight Street in San Francisco at 11:00 A.M. Informer was in his own vehicle, which was searched, along with his person, by witness and Narcotics agent Steffensen. (TR 45.) The informer then drove west on Haight Street to Pierce, north on Pierce, and parked on Pierce between Oak and Page Streets. Witness followed and parked nearby with agent Steffensen. About 11:15 A.M. a 1955 green Chrysler parked near the corner of Page Street on Pierce. A woman,

later identified as appellant Josephine Evans, alighted from the vehicle. She walked up Pierce Street, the informer got out and crossed the street. Then both walked into a vacant lot, out of view of the witness. They remained out of view "just a moment or so" when the woman walked back to her vehicle and walked to the vacant lot again and out of sight of witness. She then returned to her vehicle, while the informer came out of the vacant lot—got into his own vehicle—each drove away separately—the informer driving to Mac's Drive-In where witness met him and received from him the newspaper wrapped package at 11:20 A.M. (TR 47-48.) This package was Govt. Ex. 1. The witness returned to the federal office, searched the informer and his vehicle, processed the contents of the package, and delivered the same to the United States chemist. He found no other narcotics upon the decoy or in his vehicle. The witness identified a piece of newspaper, some white coin envelopes, and some tinfoil, as being a part of the package containing the heroin, and these items were identified as Govt. Ex. 3, as one exhibit. Witness testified that there were no stamps of any kind upon the packages. (TR 49-52.)

Cross-examination. Witness testified that on February 27th he took back the $350.00 he had given to the informer, that he had a record of the numbers of the bills but did not have it with him, that he returned the same money to Gilmore on March 1st, that he never saw that money again. (TR 52-54.) Witness testified they had no facilities for recording things heard over the Schmidt receiver, also that "at various

times various agents were in the restaurant" while informer was there on March 1st. (TR 55.)

Wilson M. Shee (TR 58-61)

Witness was an interpreter for the Federal Bureau of Narcotics, assigned to surveillance "within the premises located at 1567 Ellis Street" on February 27, 1957. He entered Oliver's Restaurant at approximately 1:00 P.M., remained for a little over an hour. He saw the informer, Gilmore, come in, and saw him leave. He saw appellant William Evans have a conversation with the informer at the end of the counter in the restaurant. The conversation lasted five or ten minutes—appellant was "just sitting there at the end of the counter having coffee".

James F. Steffensen (TR 61-66)

Witness was a Federal Narcotics agent. At 2:00 P.M. on March 1, 1957 he was in a panel truck owned by the Federal Bureau of Narcotics and containing a receiving device for the Schmidt transmitter. He was parked near the Oliver Restaurant. He testified he saw the informer seat himself at the counter in the restaurant, and order and eat a meal; that he saw him go alone to the rear of the restaurant "which was a kitchen". (TR 62.) He went alone, was out of sight of the witness for three or four minutes, then reentered the restaurant with the appellant Josephine Evans. The informer then had a conversation with that defendant and left the restaurant. At 7:45 P.M. witness was still in the panel truck. He saw appellant

William Evans leave the restaurant and enter the vehicle of the informer. Testified that as appellant entered the vehicle he heard him say "I am leery of the panel truck. It has been parked there all afternoon."

Cross-examination. Witness had never seen the informer, and appellants William Evans and Josephine Evans, all three together at any time. Neither had any other witness. The rest rooms of the restaurant are in the back and one has to go in the direction of the kitchen to get there. Witness did not know whether the informer went to the men's room on this occasion. That appellant Josephine Evans was dressed to indicate that she was working there:

> "Q. And the only thing you can say is that when they came out you saw both Sine Gilmore and Josephine Evans?
>
> A. That's correct, sir." (TR 65-66.)

John C. Campbell (TR 66-76)

Witness was a Federal Narcotics agent. On March 4, 1957 at 11:15 A.M. he was parked with another Narcotics agent (Przibórowski) on Pierce Street between Fell and Hayes. Using binoculars he saw the informer standing on the edge of a vacant lot, saw appellant Josephine Evans walk toward him and make a motion with her hand, saw the informer turn, make a few steps backwards into the vacant lot, bend over, straighten up, and place his hand in the pocket of his sport coat. The informer then walked across the street to his own vehicle, which was on the opposite side of

the street from the 1955 Chrysler driven by appellant Josephine Evans. (TR 66-68.)

Cross-examination. The witness did not see appellant William Evans at that time and place, nor did he ever see informer and Josephine Evans and William Evans together.

Examination by the Court. Witness testified that informer was looking in the weeds, that after appellant Josephine Evans pointed farther back in the lot Gilmore went deeper into the lot, then went back to his car. That the two agents left the scene and went back to their office. That witness had seen Josephine Evans five or six times prior to that time in Oliver's Restaurant—in the 1955 Chrysler—and entering and leaving 181 Thrift Street—which was a single family dwelling where she lived. (TR 72-74.)

Recross-examination. Witness testified that while at the vacant lot appellant Josephine Evans was wearing working clothing in the nature of a uniform.

Sine Gilmore (TR 76-125)

This witness was the "informer", euphoneously termed "special employee". He admitted to conviction of two felonies, both violations of narcotic laws in the State courts, and to the service of prison terms therefor, and that he had used narcotics but was not doing so at the present time. That he knew Josephine Evans casually and had known her for a month and a half or two months. That he knew William Evans casually and had known him about the same length of time. He had met them upon the street some place, he did

not recall where, but that he did not meet them at the same time. He thought he had met William Evans first—and he had conversations with either or both of them at Oliver's Restaurant. (TR 76-79.) Witness stated:

"Q. Did you ever receive narcotics from either Josephine Evans or William Evans?

A. I suppose so.

Mr. Klang. I move that the answer be stricken, if your Honor please.

The Court. Motion denied.

Q. (By Mr. Riordan). When did you first receive narcotics from either of them?

A. I don't remember when I first.

Q. Well, approximately when, taking into mind the closest date in connection with March 4, 1957.

A. Maybe one or two weeks." (TR 79-80.)

He met Josephine Evans in the vicinity of Page and Pierce Streets around March 4, 1957 and was not too sure of his dates. He went over and got "some stuff out from under a board" which was "by a garbage can top" inside a fence in a vacant lot. (TR 80-82.) He had no conversation with Josephine Evans. She accompanied him to the lot, she pointed at the board. Witness found nothing under the first board but found a package under the second board. The boards were close together and he could not tell which one she was pointing toward. The package contained Govt. Ex. 1 and 3. Afterward he drove to a Drive-In. There were two or three carloads of Narcotics agents watching him at the vacant lot. At the Drive-In agent Nickoloff had "taken the stuff". (TR 82-85.)

"Q. Did you give her any money for this package?

A. I gave her some money in the morning before I went over to meet her.

Q. How much did you give her?

A. One hundred dollars and some. I don't know exactly.

Q. One hundred and some odd dollars is that the answer? Where did you give her this money?

A. At the Cafe." (TR 86-89.)

He gave her no other money for the package and gave appellant William Evans no money for it. He received money from agent Nickoloff at the Federal Building, $350.00, and paid it to Josephine Evans "for some stuff that I owed for", together with $350.00 of his own money. (TR 86-87, 89.) He gave her this at Oliver's Restaurant. That is, Gilmore owed her $700.00 for prior transactions which he referred to as "on consignment" (TR 98) and paid her the $700.00 for those. He met William Evans the night before he paid Josephine Evans the money but did not discuss narcotics with him. Evans asked him the night before to "carry him to the pool hall" which he did. Later that night he "carried him home." The informer testified that while he was driving him home he told Evans that he wasn't getting along very well and that Evans told him "he would help me out." (TR 90-92.) That Evans was going to let him have the money "until I could get some to pay him back."

"Q. (by Mr. Riordan). Prior to this did you ever have any narcotic dealings with William Evans?

* * * * * * *

A. I never received any narcotics from him.

Q. (by Mr. Riordan). You never received any narcotics from Mr. William Evans?

A. That's right.

Q. Did you discuss narcotics with him?

A. I might have on occasion but I don't know.

Q. You might have on occasion but you don't recall?

A. Not along in that time.

Q. Did he ever tell you he would give you narcotics to sell?

A. No, he never have told me that he would give me them to sell."

(TR 93.)

The informer witness testified that on February 27, 1957, at about noon time he placed a phone call from the Federal Bureau of Narcotics to Oliver's Restaurant, and that it was monitored by agent Nickoloff.

"Q. To whom did you speak on that phone?

A. Well, I think it was Evans.

Q. It was Evans?

A. I think so."

The phone call was completed.

"Q. Who did you ask for?

A. I think I asked for Bill.

Q. What did the person on the other end of the line say?

A. I think he said 'This is Bill.'

Q. Do you know who that 'Bill' was?

A. I guess it was him."

Motions to strike these answers were overruled.

"Q. (by Mr. Riordan). Then what did you say, Mr. Gilmore?

A. Why, I told him, as near as I can remember, something about somebody coming from Stockton.

Q. Tell us the best you can remember.

A. That he wanted something, some stuff, and I think he told me I would have to see the boss.

* * * * * * *

Q. (by Mr. Riordan). What was meant by 'stuff'?

Mr. Klang. I object to that as calling for an opinion and conclusion of the witness, Your Honor."

The Court overruled.

"Q. (by Mr. Riordan). What was meant by 'stuff'?

A. Well, narcotics.

Q. All right. When he said 'You will have to see the boss' who was the boss he was referring to if you know?

A. Well, I guess he was talking about her.

Q. Who is 'her'?

Mr. Klang. I move to strike that as an opinion and a conclusion of the witness. That is, that he was talking about 'her'."

The Court overruled.

"Q. (by Mr. Riordan). Who is 'her'?

A. I guess he was talking about Josephine.

Q. Josephine Evans? All right. Now prior to March 4th of this year had you given Josephine other money for the purchase of narcotic drugs?

* * * * * * *

A. Yes—probably two or three times."

(TR 95-97.)

Witness testified that he had conversation with William Evans about that time "but not 'concerning stuff'."

> "A. Not when I was buying anything, not those three or four times I am talking about when I buy narcotics."

When he drove appellant William Evans to the pool room Evans told him that the truck had been there all day and didn't look so good sitting there all day. Witness had on a listening device. On previous occasions when he purchased narcotics from Josephine Evans he did not pay for them in advance but "get it on consignment."

> "Q. You received them and later went back and paid for them is that right?
> A. That is right."
> (TR 97-99.)

Cross-examination. Witness testified that he gave Josephine Evans a hundred and some odd dollars on the morning of the vacant lot transaction, that it was his own money and that it did not come from the government. (TR 101.) That he gave her the $700.00 the day before—it being money he had owed her for five or six days past, that he told agent Nickoloff that he owed this money—this $700.00.

> "Q. No. Now, let you ask me this: Have you ever had any deal with William Evans whereby he agreed to deliver you any narcotics?
> A. No. No, he never." (TR 102-103.)

When interrogated about Govt. Ex. 1 and 3 as regards William Evans the answer was:

"A. He didn't know anything about it."
(TR 103.)

He had talked with Josephine Evans that same morning in the cafe. There were no government agents there and William Evans was not there. That the night he drove William Evans to the pool room:

"Q. Now, at that time did you and Mr. Evans discuss narcotics?

A. I don't think narcotics was mentioned.

Q. Not at all that day, did you?

A. So far as I can remember, he never discussed, come out and said 'narcotics' or nothing like that."
(TR 105.)

Witness testified that he placed the monitored call on February 27, 1957, but that he had never before talked to William Evans on the telephone and was not familiar with his telephone voice. He also testified, with respect to the narcotic agents, that "I know I told them he didn't sell narcotics."

Q. You told them he didn't sell narcotics?

A. So far as I knew he never sold any."
(TR 105-106.)

Witness testified that the government made him no threats or promises but that there was a "$5000 or $500 reward, or something like that" indicated upon a poster that was discussed. The informer admitted that for $500 he was willing to "turn informer against

your friend." (TR 107.) Considerable discussion was had as to several prior arrests about the same time. (TR 108-110.)

Witness also testified that the package he got out of the vacant lot (Govt. Ex. 1 and 3) "was on consignment," that the money paid was "just part payment," and that "The rest of the five hundred and some odd dollars," was "on consignment." Witness testified that appellant Josephine Evans told him nothing about narcotics, that she just told him to go to look in the vacant lot and that he did not, in fact, know what was in that package.

"A. No; I don't—I didn't."
(TR 111-112.)

The witness testified that when he was talking to William Evans on the monitored telephone call he (the witness) was "talking about narcotics" but:

"Q. You don't know that William Evans so understood it do you?

A. I couldn't truthfully say that I did."
(TR 112.)

Redirect Examination.

"Q. Mr. Gilmore, prior to picking up this package here, did you ever give any money to William Evans for the purchase of narcotics?

A. I never gave him no money to purchase narcotics.

* * * * * * *

A. I never have given him no money for the purchase or [of] narcotics, but I got some money from him and I gave him some."
(TR 113.)

Witness referred to one time particularly when appellant William Evans had bought an automobile license for him for $20.00 and that another time the witness gave William Evans $100 or $150 to reimburse him for payment made on a car belonging to the witness. (TR 114.) The United States attorney interrogated the witness with respect to a written statement that he had signed in the Federal Bureau offices on March 4, 1957, three typewritten pages on white paper. Witness said the statement was correct except that the comments as to the two trips in the informer's automobile were "backwards." (TR 115-116.) He testified that while en route to the pool hall with William Evans, when the panel truck was being discussed, that Evans said: "All the money in the world isn't worth going to the penitentiary for." (TR 118.) Witness testified that he did not know what appellant William Evans meant by saying that things were hot and that things should cool off for a few days.

> "A. I was referring—I don't know that he meant police. I don't know."

Witness testified that he never told William Evans that he gave Josephine Evans the money but that he did tell him that he was broke, and had no money, "But that didn't have nothing to do with what I gave Josephine. I didn't tell him anything about that." (TR 119.)

Recross-Examination.

> "Q. And isn't it true that each and every time, or whenever you tried to talk to Evans about

narcotics he always refused to talk to you about narcotics; isn't that right?

A. He would refer more or less to 'the boss'.

Q. Well, he told you that he wouldn't have any dealings in narcotics, isn't that correct?

A. I don't remember exactly what was said over the phone on that, but if he would say anything, I never could get him to talk about anything that would amount to anything.

Q. Well, didn't he tell you that he didn't want to make any deal because it was too hot or you might go to jail?

A. Well, he told me—no, not like that. He told me, he said, 'I got to think about my kids', and that he didn't want to do a deal with it because he didn't want to be away from his kids, and that he had been away from them all the time.

Q. All right, then he told you that no deal in the world was worth going to the penitentiary for, isn't that right, or words to that effect?

A. Words to that effect."

(TR 124-125.)

Eldon Prziborowski. (TR 126-152.)

The witness is a Federal Narcotics agent. In the early morning of March 5, 1957 he entered the second story flat at 953 Broderick Street, San Francisco, to serve an arrest warrant issued by the United States Commissioner. It was approximately 4:10 in the morning and he had other agents with him. He placed the appellant, William Evans, under arrest. (TR 126.)

Voir Dire Examination.

The witness believed that William Evans was a resident of said location because on prior occasions he had

seen him go in and out of the premises after completing work, that the night Evans was placed under arrest he was dressed in underwear and said he had just gone to bed. That the woman living there had stated that her name was "Mildred Evans," that she was married to William Evans, that they lived there together, and that they had children there. The witness placed William Evans under arrest but did not go down to "book him." There was no search warrant—only an arrest warrant. The witness did not see the warrant but was told by other agents that one had been issued. Relative to the search of the premises:

> "A. I made this search incidental to the placing of the defendant, William Evans, under arrest . . . for violation of the Federal Narcotics Laws."
> (TR 127-130.)

He testified that the informer (Gilmore) told him "indirectly" that "he had had conversations with William Evans and ordered narcotics from William Evans, and that Josephine Evans had made the deliveries of narcotics to him." (TR 131.)

Direct Examination.

Witness found marihuana (Govt. Ex. 2) concealed beneath or inserted in the top riser of the stairway, behind the carpet. (TR 133-134.) Witness testified that he approached the appellant William Evans with a package and that this conversation was had, the witness being the interrogator:

> "Q. What is that?
> A. What is what?

Q. It looks like marihuana to me.
A. Is it mine?
Q. I don't know.
A. Where did you find it?
Q. I found it in the house by the top riser of the carpet.
A. Well, then, will my answer make any difference as far as you obtaining a conviction in this case?
Q. It might.
A. Well, I will try to figure out what you have against me first before I answer that."
(TR 135-136.)

The witness instructed both William Evans and Mildred Evans to get dressed, that they were going down to "book them." He testified that Evans said, "Well, what are you going to book her for?" The witness said, "For the marihuana, joint possession." The reply was, "Well, you don't want to book her for that." (TR 136.)

After arrival at the Federal Building there was a conversation between the witness, agent Yannello and William Evans.

The witness testified that agent Yannello told the appellant William Evans that "we consider you pretty big in the dope business and you must have some pretty big connections." That Evans said: "What do you call big connections?" That Yannello replied: "A. C. Marks". Then, according to the witness, a discussion of A. C. Marks and of the Senator Daniels Subcommittee narcotic investigation took place. When Evans said that A. C. Marks and the seaman who

brought the narcotics to him "weren't very big", Yannello said: "Do you mean that 70 kilos of heroin over a period of several years isn't pretty big?" To which appellant said: "Well, that's what they say. They weren't that big, though." (TR 137.) When Yannello asked if he could help the government in making a case against anybody that Evans would "consider a big connection" appellant said that there was no person in the United States too big "but what I couldn't buy narcotics from them if I wanted to." To further requests to help the government he stated (all this from the testimony of agent Prziborowski only);

> "Well, you mean to tell me that crime does pay?"

To Yannello's offer to call help to the attention of the courts in this appellant's behalf Evans said: "Well, what does that get me? Ten years instead of twenty?"; adding "Well, I don't want to be an informer. I consider any informer as the lowest of the low." (TR 138.) Adding further:

> "Anyhow, if I was ever to do anything for anybody like that, I wouldn't do it in the fashion that these informers that you have do."

Then stating that he had been subpoenaed before the Daniels Committee and questioned about narcotics.

Witness testified that he had advised this appellant of his constitutional rights at the time he placed him under arrest at 953 Broderick Street, and that the defendant told him "I want an attorney. I don't want to say anything until I have an attorney." Witness

testified that himself, agent Yannello and appellant William Evans were present at this discussion and that neither transcript nor recording was made of it. (TR 141.)

The witness now testified respecting events on the morning of March the 5th at the Broderick Street premises. He testified that the premises were occupied by William Evans, Mildred Evans and two small children asleep in the back room; and William Evans said they were his children and that Mrs. Evans said they were her children. That Mildred told him that her name was "Mildred Evans"; that the children were very small, under three years old. That he asked Mildred "if the marihuana was hers," and that she said "No, it was not." (TR 142-143.)

Cross-Examination.

Witness testified that appellant Evans did not "specifically" say the marihuana was his, that he did not ask Josephine Evans (not present) respecting it, and that Mildred told him it was not hers. When asked if Mildred didn't tell him whether appellant Evans lived at that location the witness said: "She didn't say either way". When asked:

> "Q. You didn't find a man's possessions in the premises, such as a lot of clothing, underwear and toilet articles, things of that kind?
>
> A. I didn't search the bedrooms."

The witness also testified that at the Federal Narcotics Bureau there were a number of agents, in the nine or ten offices, as well as shorthand operators and

typewriters. That on other occasions at these offices he had had tape recordings of conversations with recording equipment there present. (TR 145-146.) That he made no effort to have the conversations recorded on this occasion. Witness explained the absence of records by stating "The presence of a stenographer might stop him from making answers." (TR 147.) He testified that he afterward told another agent and that the other agent made notes. That he read the case report after it was written but that he did not have the report with him. (TR 150.) He also testified that it was agent Yannello that asked the first question respecting the Daniels Committee.

Theodore J. Yannello. (TR 152-160.)

The witness is a Federal Narcotic agent. Accompanied by other agents he went upon the premises at 953 Broderick in the early morning of March 5, 1957 "To take Mr. Evans into custody". That upon entering he observed William Evans, "a woman by the name of Mildred Evans and two small children". He identified Govt. Ex. 2, as having been found "behind the top riser" in that apartment, and that agent Przibórowski and appellant William Evans had a conversation respecting it, of which the agent overheard a part, that Evans asked what the package was and where Przibórowski had found it. That Evans made some statement concerning whether it would make any difference if he said it was his or not and when Przibórowski said "It might" Evans replied to the effect that he had "better wait and see what

the case was against him before he said anything else concerning that particular package." (TR 154.) Mildred said in the presence of William that "the packet was not hers".

Referring to the conversation at the Federal Building the witness testified that appellant Evans "mentioned the name of Marks for the first time" and said that the seamen from whom Marks was "scoring" were "not so big." (TR 155.) That appellant went on to say that "there is nobody that is so big that I can't score from them" and that "There is no amount of narcotics or any amount of money that is too large for him if he wished to do so." (TR 156.) That in a discussion wherein agent Przibórowski asked the appellant Evans to "assist our office" he replied "Well, if I decide to help you, I wouldn't do it the way you do it. I would do it some other way." When the witness said: "How's that?" he replied, "Well, I am not going to tell you. That's for you to figure out." Asked respecting the Daniels Committee he said that he had appeared before them and that "they were doing their best to frame him."

Here, again, the attitude of the trial judge is shown (TR 157):

> "A. (by agent). Well, I will say one thing for you, I certainly admire the way you pick your women.
>
> Mr. Klang. May it please your Honor, most respectfully, I don't like to rise all the time, but I don't think all of this is relevant or competent or material to the issues in this case.

Mr. Riordan. I think it goes to his knowledge of this traffic.

Mr. Klang. He is talking about women now.

The Court. Women may play an important role in the conclusion reached by the Court in the connection of the possession of this contraband. Overruled."(Apx. 2)

The witness said that this appellant always had "a woman out in front of you so that you are never the man in front" and that appellant only smiled and said nothing. The witness said he told this appellant that the Daniels Committee "has estimated that you were furnishing between 70 and 80 percent of all the narcotics in certain cities." (TR 158.) The witness said he told this appellant that he was "accused or given the credit for supplying 80 or 90 per cent of the narcotics in the cities of Chicago, Detroit, Indianapolis and Cleveland and that would make you a pretty big man." The appellant "didn't deny it."

Judge Harris showed great interest here, by having the witness restate the figures. (TR 158.) Yet this was in no wise "evidence against the defendant William Evans."

Witness testified that this appellant told him several times that he feared the officers would "frame him."

(Apx. 2) To appellants, this frivolous comment by the trial judge to an outrageous volunteered statement by the witness Yannello is highly indicative of the manner in which this case was tried, without the presence of a jury.

Cross-Examination. (TR 159.)

The witness was interrogated respecting his knowledge as to the Price-Daniels investigation, and disclosed lack of any substantial knowledge thereof. The witness also stated that he made no effort to record the conversation had with this appellant or to call in a stenographer to make notes thereof.

Recalled. (TR 210-219.)

This witness was recalled by order of the Court after the appellants had completed their case in the court below. At this time he said (TR 211) that appellant William Evans "stated that he wanted to find out first how bad the case against him was before he decided which way to answer concerning that particular packet." (Govt. Ex. 2, marihuana.) That this appellant asked if it was necessary to take the mother and children out of the apartment that night and that witness replied that "we have no choice but to book you both on joint possession of the marihuana, unless, of course, you are so disposed as to say that it is yours." He testified that this appellant did not "reply either way" and said "Well, it is one of those things then" and that the juvenile authorities came and took the children and the agents took Mildred Evans, but she was not booked.

In answer to interrogation by the court (TR 211) witness denied knowledge of why Mildred was not "booked." Witness also denied that he threatened William Evans with taking the children away unless he admitted that the marihuana was his. The witness

testified to the physical arrangements of the flat and stairway. (TR 213-215.) That the agents made a search of the flat which they "considered rather thorough"—describing the method they employed, including the entire flat and the bathroom, dresser drawers, clothing, whether dirty or clean, suitcases, carpets. (TR 216.) The Court interrogated the witness respecting the packet which contained the marihuana and he said he had noticed none of such packets in Oliver's Restaurant. He testified also that the heroin in Govt. Ex. 3 was in the same type packet as the marihuana—these packets being coin holders with discoloration caused by chemical processing.

The witness (TR 218) was expressly unable to say that the envelopes contained in Exs. 2 and 3 were "identical"—merely that they were "contained in coin wrappers."

Cross-Examination on Recall.

Here the witness admitted that at no time did this appellant say with reference to the marijuana "This is mine," but that in his opinion Evans was "fencing." Testimony closed with this:

> "The Court. Would you consider that amount of marijuana a commercial property or a commercial quantity?
>
> The Witness. Your Honor, I would say an amount of that nature would be used purely for the individual's own personal use. It would be unlikely a person would sell that amount.[Apx. 3]

[Apx. 3] This was in reply to the Court's own inquiry. The answer discloses that nothing else was found in the flat and that the quan-

The Court. You found nothing else in the apartment?

The Witness. No.

The Court. I have no further questions."

Milton K. Wu. (TR 160-162.)

Witness was a Federal Narcotics agent. This witness testified only to the arrest of appellant Josephine Evans on the early morning of March 5, 1957, at 181 Thrift Street, San Francisco, and to the fact that while en route to the Federal Bureau she stated to the agents: "I will be able to get probation for this, won't I? I have never been in trouble before."

Cross-Examination. Witness testified that neither William Evans nor Mildred Evans was then present and that Josephine Evans was the only passenger in the car aside from the agents.

Hanley E. Anderson. (TR 163-164.)

This witness was also a Federal Narcotics agent, and he testified to the service upon the appellant William Evans of an order form for the possession of marihuana. That it was a typewritten demand made pursuant to the Internal Revenue Laws—that he also served it upon appellant Josephine Evans, and testified further that neither of the appellants furnished him with "the order form required by the Secretary

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tity was for an indivdual's own personal use. The Government's attorney stated that it would make "About five cigarettes, Your Honor" (TR 217). Nevertheless, Judge Harris sentenced appellant Willam Evans upon count 3 to imprisonment for ten years and fined him $1,000.00 (TR 8).

of the Treasury." These order forms, two in number, were admitted and marked Gov't Ex. 4.

Cross-Examination. That both of these defendants were served while they were in jail.

William Evans. (TR 176-195.)

The defendant testified that he lived above Oliver's Restaurant, that he lived there upon March 4, 1957. He had lived there ten or fifteen days before his arrest. That he knew Mildred Moore, that she was the mother of a child of his, that he had never been married to her, but that he had spent "as much as three or four nights since January 10th" with her at 953 Broderick. That no nights were spent in succession. He also admitted that he lived with the appellant Josephine Evans "Oh, off and on since 1950, I guess, 1951 or somewhere in there" and lived with her as man and wife since he had been in San Francisco at 181 Thrift Street. He admitted to convictions of narcotic felonies, once in Illinois, and once in Michigan—both Federal cases. (TR 178.) Also that he had once been convicted of grand larceny. That he knew Sine Gilmore. That he met him the day before the last day for the payment of 1956 automobile license plates. That he played pool often with Gilmore and that he had seen Gilmore eat once or twice a day in the restaurant. That he had never at any time sold narcotics to Gilmore. (TR 180.) That he had sold narcotics to no one in San Francisco. That he had received a telephone call from Gilmore on February 27, 1957, and with respect to the conversation said:

"A. As near as I can remember the exact words, he said, 'The man from Stockton is back,' and I said, 'OH?' He said: 'What do you want me to do?' I said: 'Well, I am pretty busy right now. Come back tomorrow.'

Q. Did you discuss any narcotics with him at that time?

A. No."

That he saw Gilmore each day for two or three days thereafter and that he did not discuss the sale of narcotics with him.

"Q. Did he ask you to sell him any narcotics during those days?

A. Well, in so many words I don't think he said 'narcotics.' I just inferred he was in pretty bad shape and that was the easiest out.

Q. Well, what did you understand him to mean by being in pretty bad shape?

A. That he wanted to sell narcotics. He had asked me about narcotics before.

Q. He had asked you? When was that?

A. I don't know when it was. It must have been near this. If the phone call was the 27th, that must have been near the 22nd or something like that of February. It was 4 or 5 days before." (TR 181.)

Questioned respecting the incident when the informer came into the restaurant this occurred. (TR 181):

"Q. Now, at that time did you observe persons whom you suspected to be narcotics agents in the restaurant?

A. Yes, I did.

Q. Did you make any remark about that?
A. Yes, I did.
Q. To whom?
A. Well, it was in a casual way to Jimmy.
Q. Who is 'Jimmy'?
A. That is what I knew Gilmore, as Jimmy. I didn't know him any other way.
Q. Go on.
A. I said, 'Oh, I see you got company,' or words to that effect. Maybe I said, 'I see your friend is with you,' or something like that. I am not sure exactly what I did say.
Q. All right. Now did you discuss any narcotics with him at that time?
A. No, I did not."

Defendant denied knowledge of any delivery of narcotics to Gilmore by Josephine Evans, denied discussing with Josephine the question of the delivery of narcotics to Gilmore, denied ever receiving any money from Gilmore for narcotics, denied ever receiving any money from anyone else that came from Gilmore. Denied he knew there were any narcotics near a vacant lot on Pierce Street. (TR 182.)

Coming to the marihuana incident he testified that he closed the restaurant at 4:00 A.M. on March the 5th, 1957, and had just gotten to the flat at 953 Broderick Street "when the police came in." That he was undressing at the time, that he was present when they found the marihuana, that he did not know the marihuana was there. (TR 183.) That the agent said "Look what we found," and this appellant asked him what it was, and he said it was a "bush." That the witness

had not seen it before and had not put it there. That he did not use narcotics, or smoke marihuana at all. That he had stated at the Narcotic Bureau office to an agent from the Internal Revenue that he would not make a tax statement until after he had talked to an attorney. That he had not been advised by any of the agents of his constitutional rights but did not know of any reason why they should have done so. (TR 184-185.)

> "Q. Well, had you done anything by way of admitting that you knew anything about these narcotics?
>
> A. No, sir."

After being taken first to the restaurant they were taken to the Federal Office Building where he had a conversation with agents Prziborowski and Yannello. That he had never heard the name of L. C. Marks prior to March 5, 1957 when he was questioned. (TR 185.) That he did not mention the name of Marks to agent Yannello and had never heard it to his knowledge. That he did not tell the agents that he considered Marks a big operator or that he could "make a score from Marks or other persons."

This appellant stated that he said:

> " 'There is things going on now that I never dreamed could happen, that the buyers'—No, I said 'that the sellers are now prosecuting the buyers.' And that was at the time a current topic in the newspapers. So somebody mentioned that the guy's name being prosecuted was L. C. Marks. I didn't remember that name again until yester-

day when they called. I remember that I had read it in the paper. I don't know who he was, what part of the case it was, but it was in the paper. Somebody who had been buying had been prosecuted by somebody who had been selling." (TR 186.)

This appellant stated further that agent Yannello made mention of assistance if he would help them secure narcotic convictions and that he asked them "What kind of a deal do you have to offer, the difference between ten and twenty?" Telling them further that "I had the technical know-how to get evidence against anybody * * * that will stand up in court against anybody in the narcotics traffic." That he did not offer to give them any assistance. That Colonel White was present and stated (TR 187) "Well, we might just as well face the fact that there's not much deal we could make." That the appellant said "I don't see any reason why I should help you in any kind of way." That he did not make any statements from which it could be inferred that he knew the marihuana was beneath the riser on the stairs at 953 Broderick Street, or that he would accept the blame if they would let Mildred go. That the book containing the report of the Senate investigation committee was in the hands of the agents at the Federal offices. That Sine Gilmore on March 1, 1957 and to the date of the trial owed him only $15.00, this debt resulting from $20.00 he gave Gilmore to pay his 1957 auto license and from which he received $5.00 in change at the time. That Gilmore owed him nothing

for narcotics in "no kind of way". Finally on direct examination:

> "Q. Do you maintain any clothes or toilet articles or other property at the place where Mildred Moore lives, 953 Broderick Street?
> A. No, I do not."

Cross-Examination. (TR 190.)

This appellant was interrogated respecting the nature of the prior convictions against him. He stated that Josephine Evans had never delivered narcotics to him or for him. That Mildred Moore had never delivered narcotics for him and that her name was Mildred Moore and that so far as "Mildred Evans" was concerned:

> "A. I put 'Mildred Evans' on an automobile that I bought for her, but I have never known her to use the name Mildred Evans."

That the car was a 1957 Chrysler. That in the telephone conversation of February 27th Gilmore did not say "The man from Stockton was in town and he wanted to get one for the man?" That Gilmore did not tell him "he had all the money and asked you if you could do anything". That Gilmore did not mention money. That he told Gilmore "I am busy, see me tomorrow". That he did not say "see the boss". (TR 191-192.)

> "Q. Do you sometimes refer to Josephine Evans as 'the boss'?
> A. Do I sometimes?
> Q. Yes.
> A. I do not.

Q. You do not? But you never asked him who the man from Stockton was?

A. The man from Stockton he mentioned to me some six or eight days before, five or six days before, maybe; but he certainly didn't mention no two pieces or one—whether it was two or one. Whatever you said before.

Q. What did you say, pieces?

A. That is what you said.

Q. I didn't use the word 'pieces'.

A. Well, whatever you said he didn't say no amount of 'pieces'.

Q. What does 'pieces' mean?

A. I don't know what you mean. I know what he told me five or six days before. He wanted $2,000.00 worth of heroin.

Q. Oh, he did?

A. Yes, for the man from Stockton.

Q. What did you say to that?

A. I thought he was crazy, told him so in so many words."

Appellant William Evans said he had used different types of narcotics but not at the present time. That on March 1st when he told Gilmore "I see you brought your friend with you?" he was referring to agent Wu. (TR 193-194.)

"Q. And you knew he was a narcotics agent?

A. I didn't know what he was, but whatever he was, he was a good excuse for me to get rid of Jimmy.

Q. Why did you want to get rid of Jimmy?

A. I don't know why. I wasn't interested in whatever he was talking about and I put it off for as long as I could. I didn't want to talk about it at all."

That when he was talking to both Colonel White and the agent he "meant that by being an informer I could bring to court tangible evidence even the defendant wouldn't argue against."

Recalled. (TR 200-203.)

Respecting the marihuana episode this appellant said that the agents were very happy because "one of them had found something" and:

> "The only time anything was said pertaining to marihuana to me when I asked one of the officers if there was any kind of way that I could leave Mildred there with the children, and he said there was only one way, and I was the only person that could do it, and that would be for me to admit that the marihuana was mine. I said that to this dark haired officer. Yannello. They told me that the only way I could have Mildred—anything in the world would have been better than having those children go out that night, and that was the only thing I had in mind. I didn't know anything else about what they had."

He denied that there was any other statement respecting the marihuana or that he had been asked "Is it mine" or that he had said "Well, does it make any difference." His remaining testimony was respecting the physical location of the apartments and stairways.

Mildred Moore. (TR 195-198.)

Witness testified that her name was Mildred Moore. That she had never used the name Mildred Evans. That she had an automobile purchased with the name "Mildred Evans" on it, but that she herself had

"never used the name of Mildred Evans". That she lived now over the Oliver Restaurant, but that on March 5th she lived at 953 Broderick Street alone with her two children. (TR 195.)

"Q. With your children? Now, did you rent those premises yourself?

A. Yes.

Q. Under what name did you rent them?

A. Mildred Moore.

Q. And did you have gas and electric service there?

A. Yes.

Q. Under what name did you accept that service.

A. Mildred Moore.

Q. And the bills came to you under the name of Mildred Moore?

A. Yes.

Q. Now, how long had you lived at 953 Broderick Street before that.

A. Not quite two months."

The witness said she had known William Evans back in Chicago. That he had not lived with her at 953 Broderick Street at any time but he did visit her about once or twice a week and that he would stay sometimes three or four hours, sometimes five or ten minutes. That she did not think that he had stayed all night since she had been at the Broderick Street address. (TR 196.)

"Q. Did William Evans maintain any clothes at your flat?

A. No.

Q. Did he have any toilet articles, shaving equipment, tooth paste, things of that kind there?

A. No.

Q. Did he ever bring any narcotics into your place there at 953 Broderick Street?

A. No.

Q. Did you ever see him with any narcotics?

A. No.

Q. Did you ever hear him make any transaction involving narcotics.

A. No.

Q. Did you ever discuss narcotics with him?

A. No."

Cross-Examination. (TR 197.)

That appellant William Evans lived at the time of the trial at 181 Thrift Street. That she was not employed since the restaurant was closed. (TR 197.)

"Q. On the morning of March 5th when Mr. Evans was arrested at your residence, was he staying all night that night?

A. No, he had just come in.

Q. He had just come in?

A. Yes.

Q. He was undressing, wasn't he?

A. He was in the bathroom.

Q. Was he going to stay the rest of the night there?

A. I don't know.

Q. Well, have you ever lived as man and wife with Mr. Evans?

A. No, I have never lived as his wife.

Q. You have?

A. No."

That she did not hear William Evans tell the officers both children were his. (TR 198.)